INSURANCE COUNSEL JOURNAL

Volume XXVIII OCTOBER, 1961 Number 4

IN THIS ISSUE

REPORTS OF COMMITTEES

CONVENTION PROCEEDINGS

Issued Quarterly by International Association of Insurance Counsel, 150 E. Broad St., Columbus 15, Ohio
Entered as Second Class Matter at the Post Office at Birmingham, Alabama

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OF LAW AND MEDICINE

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interest of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

THIS is my first opportunity as President to address all of our members. At this beginning of a new Association year, we can be proud of the fact that our organization is basically strong and demonstrably effective. Let's look at the encouraging evidence which proves this to be true.

After thorough research and analysis by Association committees over several years, there evolved a year ago the Defense Research Institute dedicated to increasing the knowledge and improving the skills of defense lawyers. DRI's manifest success has already been firmly established. Its up-to-the-minute news-letters and its excellent monographs, already published, are exceedingly useful. Many more such helpful tools for defense lawyers are in production. This is a product of Association effort which deserves the support of every member.

Our JOURNAL has long been recognized as a superior legal periodical. With Bill Knepper's selection at Montreal as President-Elect, his magnificent service as JOURNAL Editor came to an end. Choice of a new Editor who could maintain the high standards of our publication has not been easy. However, I am delighted to report that Kraft W. Eidman of Houston, Texas has accepted this responsibility. Few men combine the variety of talents which Kraft has demonstrated in prior Association assignments. The JOURNAL continues in good hands.

Legislatures in many states were subjected last year to much proposed legislation adverse to the public, inimical to the great insurance industry with which we are so closely affiliated, and in numerous instances dangerous to the American system of jurisprudence. In each state where this condition arose, a responsible committee of defense attorneys was appointed by Denman Moody, as President of our Association, to resist such undesirable legislation. The most eloquent testimonial to the effectiveness of this project is the fact that a minimum amount of such legislation was adopted. This program will be actively pursued throughout the current year wherever the demand arises.

The Association's committee structure is in excellent shape and well organized for this year's activities. That this was inevitable was made abundantly clear when the incredible number of almost 600 of our members returned the Committee Preference Sheets sent prior to appointment of this year's committees. This amazing demonstration of active interest, supplemented by well-attended organizational meetings of most of our standing committees at Montreal, is a healthy guarantee of creditable and effective committee accomplishment during the current year.

Besides all else, your Association has a strong and adequate membership composed of the leading defense lawyers of the United States and Canada. Last, but not least, we are sound financially.

I am deeply grateful for the opportunity to serve as President of this fine organization. I fully appreciate the responsibility it involves. You may be assured that I shall make every effort to discharge that responsibility. With the valuable assistance of the officers, the Executive Committee, the committee chairmen, and the membership at large, I have every confidence that our Association may look forward to another year of accomplishment. Your advice and recommendations to your President and other officers can help us attain that goal.

PAYNE KARR
President

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New York Mid-Winter Luncheon

The nineteenth annual mid-winter cocktail party and luncheon for all members of the Association and their families and guests will be held on Saturday, January 27, 1962, at the Hotel Plaza, 59th Street and 5th Avenue, New York, with the reception starting at 12:00 noon and the luncheon starting at 1:00 o'clock p.m.

As usual, notices will be mailed to all members in New York, New Jersey, Pennsylvania and Connecticut. Others desiring to attend should write to Chairman Price H. Topping, 50 Union Square, New York 3, New York, for reservations.

Serving with Mr. Topping on the permanent committee on arrangements are Milton L. Baier and Ernest W. Fields.

Biographical Sketches Of Newly Elected Officers

President

PAYNE KARR, 1411 Fourth Avenue Building, Seattle 1, Washington. Born Seattle, Washington, February 15, 1909. Married Susan H. Fitch, February 2, 1933; two daughters, Mrs. Robert L. Manlowe and Cindy; two sons, Bob and Bill. Received A.B., University of Washington, 1929; LL.B. George Washington University, 1932; admitted to practice 1932. Member of firm of Karr, Tuttle, Campbell, Koch & Granberg. Member of American, Washington State and Seattle Bar Associations; Fellow of the American College of Trial Lawyers; American Judicature Society; Phi Delta Phi; Order of the Coif. Member of I.A.I.C. since 1938.

President-Elect

WILLIAM E. KNEPPER, 150 East Broad Street, Columbus 15, Ohio. Born Tiffin, Ohio, October 25, 1909. Legal education, Ohio State University and Columbus College of Law. Admitted to Ohio Bar 1933. Married January 13, 1933 to Lucille Witten; two children, Richard Scott and Bonne Lee. Member of firm of Knepper, White, Richards, Miller & Roberts. Fellow, American College of Trial Lawyers. Member: American, Ohio State (executive committee, 1951-54) and Columbus (president, 1947-48) Bar Associations; Ohio Bar Examining Committee, 1945-50 (chairman, 1950); Exchange Club (past president and past district governor); Pi Kappa Alpha; Board of Directors, Columbus Area Chamber of Commerce, 1958- ; St. Mark's Episcopal Church. Editor, INSURANCE COUNSEL JOURNAL, 1955-61; Director, The Defense Research Institute, Inc. Chairman, Ohio Underground Parking Commission, 1955-58. Chairman, Franklin County Court House Annex Building Commission, 1946-54. Chairman, Board of Directors, The Ohio Bar Title Insurance Co. Honorary Member, Supreme Council 33°, Northern Masonic Jurisdiction. Member of I.A.I.C. since 1935.

Vice President

JAMES P. ALLEN, JR. 175 Berkeley Street, Boston. Massachusetts. General Attorney of Liberty Mutual Insurance Company. Born Brooklyn, New York, March 20, 1907. Graduated St. John's University, Brooklyn, New York; LL.B. 1928. Admitted to New York Bar 1929, Massachusetts Bar, 1938. Joined legal staff of Liberty Mutual as trial attorney in New York in 1932, transferred to Home Office Legal staff in 1938. Married; three sons. Member: Delta Theta Phi; Weston Golf Club; Webhannet Golf Club; Wellesley Club; Boston, Massachusetts, New York and American Bar Associations. Member of I.A.I.C. since 1949.

Executive Committee

GORDON R. CLOSE. Born Chicago, Illinois, 1906. Legal education John Marshall Law School, LL.B., 1932. Admitted to Illinois bar 1932. Member of firm of Lord, Bissell & Brook. Fellow, American College of Trial Lawyers; Member: Society of Trial Lawyers of Chicago (past president; The Law Club of Chicago; Chicago (Board of Governors 1958-60) and American Bar Associations. Member of I.A.I.C. since 1951.

WILEY E. MAYNE, 1109 Badgerow Building, Sioux City 1, Iowa. Born Sanborn, Iowa, January 19, 1917. Married Elizabeth Dodson, January 5, 1942. One daughter, Martha; two sons, Wiley E., Jr., and John. Harvard College S.B. 1938, Harvard Law School and Iowa Law School J.D. 1941, Phi Delta Phi. Special Agent, FBI, 1941-43. Lieutenant (j.g.) USNR 1943-46. Partner in firm of Shull, Marshall, Mayne, Marks & Vizintos; member Executive Council, Junior Bar Conference of ABA 1949-52; Board of Governors, Iowa State Bar Association, 1950, 1958- ; Commissioner of Uniform State Laws from Iowa, 1956-60; Fellow, American College of Trial Lawyers; National Association of Railroad Trial Counsel; Member of I.A.I.C. since 1952.

WALLACE E. SEDGWICK, born September 23, 1908; admitted to bar 1937, California. Preparatory education, University of California (A.B., 1930); legal education, Southwestern University (LL.B., 1936). Member of firm of Sedgwick, Detert, Moran & Arnold, 100 Bush Street, San Francisco 4, California. Lecturer on Trial Practice and Techniques in the University of California Continuing Education of the Bar Program, and at Hastings Law School. Member: Bar Association of San Francisco; The State Bar of California; American Bar Association; Fellow, American College of Trial Lawyers. Member of I.A.I.C. since 1948.

Editor

KRAFT W. EIDMAN, 8th Floor, Bank of the Southwest Building, Houston 2, Texas. Born Liberty Hill, Texas, January 17, 1912. Married Julia Mary Bell, August 31, 1940; three sons, Greg, Dan and John. Preparatory education, Rice University and University of Texas (A.B. and LL.B., 1935); admitted to practice in Texas, 1935; admitted to United States Supreme Court. Partner in the Firm of Fulbright, Crooker, Freeman, Bates & Jaworski; Member of State Bar of Texas, American Bar Association, Houston Bar Association (President, 1960); Fellow, American College of Trial Lawyers; Chancellors and Phi Delta Phi. Lt. Commander, U. S. Navy, World War II, 1942-46; Vice-President, The Defense Research Institute, Inc.; member of I.A.I.C. since 1951 (Executive Committee, 1957-60).

Newly Elected Members Of The International Association Of Insurance Counsel

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Journal Subscription Price Increased

By order of the Executive Committee the subscription price of the INSURANCE COUNSEL JOURNAL has been increased to $15.00 a year effective January 1, 1962. All paid subscriptions commencing after that date and all renewal subscriptions will be at the new rate. Single issues published in January, 1962, and thereafter will be priced at $3.75 each.

This change is required because of increased publication costs and is the first change in the JOURNAL's subscription price since July, 1952.

Members of the International Association of Insurance Counsel are not affected by this price increase. As in the past, a member's dues include his subscription to the INSURANCE COUNSEL JOURNAL.

CURRENT DECISIONS

Recent decisions of the courts dealing with insurance and negligence law and practice are included in these pages. Journal readers are asked to send in digests of such rulings. Unreported cases dealing with novel questions are especially desired. Members of I.A.I.C. should submit their contributions to their State Editors.

Edited by
R. HARVEY CHAPPELL, JR.
Richmond, Virginia

AUTOMOBILE INSURANCE—FAILURE TO SERVE INSURER IN UNINSURED MOTORIST ACTION FATAL DEFECT

Creteau v. Phoenix Assurance Company of New York, 119 S.E.2d 336 (Va., 1961)

In an action against insurer which issued policy containing uninsured motorist endorsement, plaintiff passenger alleged that insurer issued policy covering automobile in which he was riding as a passenger; that she obtained judgment against one Rawls, an uninsured motorist, in the amount of $5,000; that the amount remained unpaid inasmuch as Rawls was without effects; that the insurer had actual notice of time, date and place of the trial well in advance of it and that it had its representative and counsel in court during the trial of the case but he did not participate therein; that on the date the action was instituted against Rawls the plaintiff, through her attorney, requested the clerk of the court to issue process to be served on the insurer pursuant to the Virginia Uninsured Motorist Act but that the clerk refused to issue the process because he thought it improper. The insurer demurred on the ground that the plaintiff had not complied with the act in that process was not actually served on the insurer as required. The Supreme Court of Appeals of Virginia affirmed the action of the lower court sustaining the demurrer holding that the language of the act requiring the service of such process is clear, unequivocal and mandatory, being a condition precedent to the benefit to the statute. The plaintiff contended that the insurer had waived service of a copy of the process upon it since it had actual notice of the pendency of the action and had a legal representative present at the trial. The court concluded that this was not enough to constitute a waiver of service of process.

AUTOMOBILE INSURANCE—FINANCIAL RESPONSIBILITY ACT DOES NOT INVALIDATE PASSENGER HAZARD EXCLUSION

Mooradian v. Canal Insurance Company, 130 So.2d 915 (Ala., 1961)

Canal Insurance Company brought suit for declaratory judgment against its insured, insured's driver and third parties who had filed suit against the insured and insured's driver for damages as a result of wrongful death. Canal had issued an auto liability policy which provided "such insurance as afforded by this policy for bodily injury liability * * * shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable * * *". The policy provided, however, by endorsement that "such insurance as is afforded by the policy for Bodily Injury Liability does not apply to Bodily Injury including death resulting therefrom, sustained by any person while in or upon, entering or alighting from the automobile". This latter endorsement was referred to as a "passenger hazard excluded" endorsement. When suit was filed by the third party administratrix of the estate of the decedent, the insured and the driver called on Canal to defend and Canal tried unsuccessfully to get a non-waiver agreement executed and also advised the insured that he should employ his own counsel. No appearance being filed for the insured, however, Canal filed a demurrer on the last day

before the insured would have been in default. In the declaratory judgment action the trial court entered judgment for Canal and on appeal this action was affirmed by the Supreme Court of Alabama. The court held that the policy involved not having been issued in compliance with the financial responsibility act, the act had no influence or application and the "passenger hazard excluded" endorsement was valid and binding. The court further held that the filing of the demurrer (at which time Canal specifically informed the insured that it did so without waiving any of the policy provisions) did not estop Canal from setting up the "passenger hazard excluded" endorsement or denying coverage. (Contributed by James E. Clark, Birmingham, Alabama, State Editor for Alabama)

AUTOMOBILE INSURANCE—LOADING AND UNLOADING CLAUSE CONSTRUED

Commercial Standard Ins. Co. v. New Amsterdam Cas. Co., 131 So.2d 182 (Ala., 1961)

Ellis was in the nursery business and his agent in selling his products was Ross. Mr. and Mrs. Richard purchased shrubbery from Ross and Ross delivered the articles to the Richard automobile, placing part of the articles in the trunk and the remainder on the floor of the automobile. Ross remained beside the open door of the automobile for a period of three or four minutes conversing with Mrs. Richard and at the close of the conversation, as a convenience for Mrs. Richard, proceeded to close the car door as a result of which the Richards' infant daughter suffered injuries to the fingers of her right hand. Commercial Standard was auto liability carrier for Richard and New Amsterdam had comprehensive general policy coverage for Ellis. New Amsterdam brought suit for declaratory judgment claiming that Ellis was entitled to coverage under the loading and unloading provision of Commercial Standard's policy and the trial court held that Commercial Standard did have primary coverage. On appeal, the Supreme Court of Alabama reversed, holding that there was no coverage under Commercial Standard's policy since the loading operation was complete when the goods were placed in the automobile and that the automobile was not at the time of the accident being "used" within the meaning of that term in Commercial Standard's policy. "The closing of the door was an independent act entirely outside the act of loading the purchased articles and the term cannot be extended to bring the accident within the coverage of Commercial's policy." Compare *Allstate Insurance Company v. Valdez*, 190 F. Supp. 893 (E.D. Mich., 1961), 28 INS. COUNSEL J. 334 (July, 1961). (Contributed by James E. Clark, Birmingham, Alabama, State Editor for Alabama)

AUTOMOBILE INSURANCE—"NON-OWNED AUTOMOBILE" CONSTRUED

Carr v. Home Indemnity Company, 170 A. 2d 588 (Pa., 1961)

Home Indemnity issued its policy of automobile insurance to Carr. Carr was involved in an accident while operating an automobile owned by her brother who resided at the same address. As a result of that accident claims were made against Carr and Carr requested Home Indemnity to defend her against these claims but Home Indemnity refused to do so upon the ground that at the time of the accident there was no coverage under the terms of its policy. Carr instituted a declaratory judgment suit against Home Indemnity requesting that the court enter a decree that the insurance policy was in full force and effect and extended to her full coverage at the time of the collision. From a decree for Home Indemnity, Carr appealed contending that the definition of "non-owned automobile" as contained in the policy was ambiguous, it being defined as "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile." On the principle that where an exception or exclusion in a policy is ambiguous she urged that such ambiguity should be resolved against the insurer. The Supreme Court of Pennsylvania, affirming the action of the lower court, held that the term "non-owned automobile" is clearly defined in the policy as not including an automobile driven by the insured but owned by a relative and that there was no ambiguity. To hold otherwise, would be rewriting the insurance policy for the parties which the court felt it could not do. The court further commented that, followed to its logical

conclusion, the insured's contention would claim coverage under one policy for all automobiles regularly used by the named insured and, therefore, a family with four automobiles would require only one policy for which one automobile policy premium was paid. Justices Cohen and Bok dissented.

**CHAIN COLLISIONS—
LIABILITY OF TWO OR THREE DEFENDANTS FOR SUCCESSIVELY INFLICTED INJURIES**

Maddux v. Donaldson, 108 N.W.2d 33 (Mich., 1961)

Modern high speed automobile traffic has increased the problem regarding liability and damages to a plaintiff injured in successive collisions. In this case plaintiff's car was struck first by defendant D's automobile approaching from the opposite direction at a high speed when it skidded over on plaintiff's side of the road. A few seconds later defendant B, following plaintiff, collided with plaintiff's automobile. All three cars were extensively damaged and plaintiff and his wife and daughter were seriously injured. Each plaintiff dismissed as to defendant D, apparently because of the insolvency of his insurance carrier. The trial court then directed verdicts and ordered the cases dismissed as to defendant B because of lack of proof as to what, if any, plaintiff's injuries were caused by the second collision. The Supreme Court of Michigan, in a 5 to 3 decision, reversed, holding that if under the proofs the injuries may be allocated within reasonable certainty to each separate collision, then the damages will be awarded accordingly. However, if the triers of fact find that they cannot ascertain the amount of damages each defendant has caused, they are authorized to assess plaintiff's entire damages against any one or all of the defendants on the ground that they have inflicted "a single indivisible injury". In a vigorous dissenting opinion, Justice Carr took the position that the conclusion reached in the instant case is inconsistent with the general rule that liability may not be imposed in a tort action of this character unless the injuries for which the recovery of damages is allowed resulted proximately from the wrongful conduct of the defendant so required to respond. He further observed: "This might well result in forcing a defendant to assume the burden of showing liability of one of his co-defendants in order to avoid a judgment against himself". (Contributed by Laurent K. Varnum, Grand Rapids, Michigan, State Editor for Michigan).

**CONFLICT OF LAWS—
LOUISIANA DIRECT ACTION STATUTE HELD TO BE PROCEDURAL**

Penny v. Powell, 347 S.W.2d 601 (Tex., 1961)

An accident resulting in the death of plaintiffs' son occurred in Louisiana and suit was brought in Texas joining the Travelers Indemnity Company as co-defendant, the plaintiffs having specifically pleaded the Louisiana Direct Action Statute. Therefore, the sole question before the Texas court was whether the Direct Action Statute of Louisiana is enforceable in Texas in a suit of this nature. The Supreme Court of Texas held that the Louisiana Direct Action Statute insofar as it provides for joinder of a liability or indemnity insurance company with the insured in tort cases is procedural rather than substantive. Therefore, applying the well-settled conflict of laws rule that matters of procedure are governed by the law of the forum, the court concluded that under Texas law there could be no such joinder in tort action. For a similar ruling see *Cook v. State Farm Mutual Insurance Company,* 128 So.2d 363 (Miss., 1961). (Contributed by John S. Hamilton, Jr., Chicago, Illinois)

**DAMAGES—
AWARDS FOR WRONGFUL DEATH REDUCED**

McFarlan v. Illinois Central Railroad Company, 127 So.2d 183 (La., 1961)

In an action by a widow in her own behalf and for the use and benefit of her minor children to recover for the wrongful death of her husband, a $15,000 judgment for the widow was increased to $46,422.70 by the Louisiana Court of Appeals. On appeal the Supreme Court of Louisiana amended the judgment of the court of appeals so as to reduce the widow's award to $20,000, the court having commented that the increase "appears to have resulted pri-

marily from the application of a mathematical formula developed in three decisions of intermediate appellate courts," which formula the Supreme Court of Louisiana disapproved, the question of amount being impossible of determination upon any scientific basis or within a mathematical certainty or exactitude. (Contributed by Alvin R. Christovich, Jr., New Orleans, Louisiana, State Editor for Louisiana).

Stuck v. Western Maryland Railway Company, 193 F. Supp. 533 (W.D. Pa., 1961)

In an action for the death of plaintiff's wife the jury returned a verdict in the amount of $86,000. The United States District Court for the Western District of Pennsylvania, on defendant's motion, held the award to be excessive and reduced it to $20,000. The court observed that from the record it appeared only that plaintiff's wife was a healthy girl of sixteen years who had been married three weeks before her death, there being nothing else in the record to support the verdict. Consequently, any award of damages was based on sheer speculation without regard to any realistic approach to the problem. The court then reviewed several other cases stating the awards which had not appeared to be excessive and, while recognizing that such cases did not solve the speculative difficulties always present in determining proper compensation to be allowed, nevertheless, they did delineate an area of recovery to which the court may refer in reaching its conclusion. The court then concluded that an award in excess of $20,000 would be unjustified. (Contributed by Frank W. Woodhead, Los Angeles, California, State Editor for California).

EVIDENCE–
IMPROPER USE OF MEDICAL JOURNAL ARTICLE IN CROSS-EXAMINATION

Wall v. Weaver, 358 P.2d 1009 (Colo., 1961)

In a personal injury action, although the issues of liability and damages were submitted to the jury, there was no serious doubt that the accident was caused by the negligence of the defendant and the case was tried, almost in its entirety, upon the issue of damages. Accordingly, the evidence of the medical experts was of major and critical importance. In the conduct of the defense of the case, defendant's counsel sought to establish that the plaintiff had exaggerated her symptoms and that although injured, her condition did not constitute extensive or serious permanent disability. To this end a medical expert was called by the defendant to give his opinion and on cross-examination plaintiff's counsel persisted in asking a series of questions, all objected to, calculated to get before the jury the contents of an article in the American Journal of Medicine. The article had not been relied upon by the medical expert and was emphatically repudiated by him because "a great deal of it has been called sheer nonsense." Notwithstanding the doctor's answers concerning the article, plaintiff's counsel persisted in framing leading questions in an attempt to convey to the jury portions of or the substance of such article following which there was a jury verdict in the amount of $15,850. On appeal, the Supreme Court of Colorado reversed the judgment and remanded the cause for a new trial on the question of damages. The court observed that Colorado decisions do not permit the use of medical writings, not relied on by the expert, during cross-examination. A physician who bases his opinion upon certain medical works may be cross-examined thereupon for the purpose of showing his error and in contradicting his testimony but it is not proper cross-examination to refer to a medical authority when the witness has based his opinion upon his experience and has not recognized and accepted the authority in question.

EVIDENCE–
MATHEMATICAL FORMULA FOR MEASURING PAIN AND SUFFERING

Yates v. Wenk, 109 N.W.2d 828 (Mich., 1961)

In an action in which plaintiff allegedly sustained injuries as a result of a rear end automobile collision, the jury returned a verdict for the plaintiff upon which judgment was entered by the trial court. The defendant appealed contending, among other things, that the plaintiff's lawyer, in his argument to the jury, suggested a mathematical formula to aid in the defermination of damages for pain and suffering. The Supreme Court of Michigan concluded that such argument was not objectionable, the

court being of the opinion that "juries automatically discount 'lawyer talk' to some degree". Compare *Pennsylvania Railroad Company v. McKinley,* 288 F.2d 262 (6 Cir., 1961), wherein the United States Court of Appeals for the Sixth Circuit declined to make a choice between the so-called Botta Rule [*Botta v. Brunner,* 138 A.2d 713 (N. J., 1958)] and those authorities holding to the contrary. The court observed that although defendant's motion for a new trial averred that the verdict was excessive, no such claim was made on appeal and, therefore, the court found it unnecessary to announce the procedural blueprint to be followed in all future trials.

EXCESS LIABILITY—
INSURER HELD LIABLE UPON APPLICATION OF BAD FAITH THEORY

Harris v. Standard Accident and Insurance Company, 191 F. Supp. 538 (S.D.N.Y., 1961)

Plaintiff, trustee in bankruptcy of insureds, brought suit to recover damages for insurer's refusal, allegedly in bad faith, to settle a personal injury action brought against the insureds. The limit of the policy was $10,000 and the jury verdict was $105,000 upon which judgment was entered. The United States District Court for the Southern District of New York, applying the bad faith theory of liability, held the insurer liable for the excess. The evidence disclosed that at various settlement conferences the insurer's counsel indicated that he knew "he couldn't win" but he had no authority to contribute any more than $5,000, these conferences having taken place before the court in the trial of the personal injury action; that insurer's attitude was that it had nothing whatsoever to gain from a settlement approximating the policy limits and nothing to lose by going to trial for it would under no circumstances be compelled to pay more than $10,000; that the insureds were never informed that a settlement within policy limits was possible; and that by reason of the financial condition of the insureds, they being insolvent, the recovery of a substantial amount from them was unlikely. Reviewing the foregoing evidence and applying the established criteria under the bad faith theory the court held that the insurer was liable for the excess. The court further held that in this instance in view of the insolvency of the insureds it was not necessary that they have actually paid the judgment before being entitled to bring suit against the insurer. (This case is on appeal).

FEDERAL COURT—
ACTION DISMISSED AFTER TRIAL FOR LACK OF JURISDICTIONAL AMOUNT

Lynn v. Smith, 193 F. Supp. 887 (W.D. Pa., 1961)

In an action for damages for malicious prosecution, the jury returned a verdict in favor of the plaintiff against three of the five defendants remaining in the case at the time of trial, the verdict being in the amount of $2,100. The plaintiff having been adjudged to be entitled to recover less than the sum or value of $10,000 and there being no set-off or counterclaim involved, the plaintiff was denied costs and, in addition, all record costs were imposed against the plaintiff. On post-trial motions the defendants' motion for judgment n. o. v. the court concluded that all of the evidence was insufficient in law to form a basis for a verdict for the plaintiff and, in addition, that there was the lack of requisite jurisdictional amount. The United States District Court for the Western District of Virginia held that the action would be dismissed, even after trial, where it appeared that the plaintiff had never been entitled to recover the jurisdictional amount and that the claim had been colorable for the sole purpose of conferring diversity jurisdiction. The court gave careful consideration in its opinion to the plaintiff's contentions and the evidence thereon as to damages and the court was satisfied to a certainty that from the proofs offered by the plaintiff at the trial of his case, he was never entitled to recover the jurisdictional amount and that this evidence required the dismissal of this civil action even after the case had been tried. (Contributed by John G. Gent, Erie, Pennsylvania).

FEDERAL COURTS—
PRE-TRIAL PROCEDURE

Link v. Wabash Railroad Company, 291 F.2d 542 (7 Cir., May 26, 1961)

The United States Court of Appeals for the Seventh Circuit has affirmed the action

of a United States District Court in dismissing plaintiff's suit for failure of plaintiff's counsel to appear in court for a scheduled pre-trial conference. It was contended that dismissal was unnecessarily harsh and that "it was neither necessary nor proper to visit the sin of the lawyer upon his client". However, the majority of the court held that the character or the degree of the sanction is within the discretion of the trial court and, in the particular case, there was no abuse of such discretion. Judge Schnackenberg dissented.

Padovani v. Bruchhausen, ... F.2d ..... (2 Cir., July 31, 1961)

A United States District Court precluded the plaintiff's use at trial of any lay testimony except plaintiff and his wife, any expert testimony or any evidence "on the issue of liability in either negligence or breach of warranty" because plaintiff's pre-trial statement on three occasions failed to enumerate witnesses to be used and did not detail claims of law. By a divided court the United States Court of Appeals for the Second Circuit reversed holding that the order of the lower court was sweeping in its mandate amounting to a penalty of a drastic nature "inflicted upon a litigant for what at most is an error or dereliction of his lawyer". In a vigorous dissenting opinion, Judge Dawson disagreed with the majority opinion which seemed "to indicate that a court may not, in a pre-trial conference, direct the parties to submit written statements setting forth the facts the parties will seek to prove at the trial and the legal theory or theories on which they will attempt to predicate a recovery." Also, in Judge Dawson's view, the majority opinion "seems to indicate that failure to comply with the court's directions may not properly be met with a preclusion order."

FEDERAL TORT CLAIMS ACT—
NEUSTADT RULING REVERSED BY UNITED STATES SUPREME COURT

United States v. Neustadt, ... U. S. ....., 6 L. ed. 2d 614, 81 S. Ct. 1294 (1961)

In *United States v. Neustadt,* 281 F.2d 596 (4 Cir., 1960), 28 INS. COUNSEL J. 9 (January, 1961), it was held that purchasers of a dwelling improperly appraised by F.H.A. appraiser could recover damages occasioned by the negligence of such appraiser under the Federal Tort Claims Act. On appeal, the United States Supreme Court reversed and entered judgment for the United States Government holding that the claim is one "arising out of * * * misrepresentation" within the meaning of the Federal Tort Claims Act and hence, was not actionable. Mr. Justice Douglas dissented.

LIABILITY—
VEHICLE OWNER NOT LIABLE FOR NEGLIGENCE OF THIEF OR OTHER PERSON NOT AUTHORIZED TO OPERATE VEHICLE

Parker and Parker Construction Co. v. Morris, 346 S.W.2d 922 (Tex., 1961)

A tractor owner was sued for property damage as the result of some unknown third party's having driven the tractor against the plaintiff's house. The tractor had been stopped with the switch cut off, the vehicle in gear and parked in such a manner that it could not roll or cause any damage. The tractor did not have a key ignition switch or other safety-locking device. The Court of Civil Appeals of Texas held that any negligence of the tractor owner in failing to equip the tractor with a key ignition switch or other safety device to prevent unauthorized persons from using it and render it inoperable when left unattended was not the proximate cause of the injuries to the house which the tractor had run against and, hence, judgment was rendered for the defendant tractor owner.

LIABILITY INSURANCE—
DELAY IN GIVING NOTICE RELIEVES INSURER

Hachmeister, Inc. v. Employers Mut. Liability Ins. Co., 169 A.2d 769 (Pa., 1961)

Employer had a liability insurance policy with Employers Mutual. While the policy was in force an employee was injured when a heavy radiator fell off the wall striking him. Representatives of the employer knew of the accident and, after conducting a preliminary investigation, concluded that the employer was not at fault. The accident occurred on October 21, 1949, and the employer did not notify the insurer until May 24, 1950. The Supreme Court of Pennsylvania held that the "reasonable no-

tice clause" is designed to enable an insurer to investigate the circumstances of an accident while the matter is fresh in the minds of all and to be able to make a timely defense against any claim filed, and, therefore, a contract requiring that notice be given to the insurer within a reasonable time will be strictly enforced. Under the circumstances, the court had no hesitancy in ruling that in the absence of extenuating circumstances, more than five months was an unreasonable delay in giving notice. The mere fact that the employer concluded, after a superficial investigation, that it was not liable for the injury, did not excuse the delay in reporting the accident. (Contributed by Frank W. Woodhead, Los Angeles, California, State Editor for California).

LIFE INSURANCE— DEATH OF FUGITIVE FROM JUSTICE RESISTING ARREST WAS NOT ACCIDENTAL WITHIN TERMS OF POLICY

Smith v. Combined Insurance Company of America, 120 S.E.2d 267 (Va., 1961)

Insurer issued policy on life of one Smith, benefits to be paid in the event of death effected by accident. Smith became a fugitive from justice on a charge of murder and on the day of his death, while resisting arrest, took refuge in a barn. The law enforcement officers surrounded the building and undertook to enter the barn whereupon they were fired upon and one of the officers was seriously wounded. In an attempt to cause Smith to vacate the barn tear gas projectiles were discharged through the door and windows and during this operation the barn caught fire and was burned. After the fire the body of Smith was found and identified. The plaintiff beneficiary contended that Smith's death was the result of an accident within the terms of the policy. After a jury verdict for the plaintiff the trial court set aside the verdict and entered final judgment for the defendant insurer. On appeal, the Supreme Court of Appeals of Virginia affirmed the action of the trial court holding that the insured's death did not result from an accident, relying upon the principle that if the insured voluntary provokes or is the aggressor in an encounter and knows, or under the circumstances should reasonably anticipate, that he will be in danger of death or great bodily harm as a natural or probable consequence of his act or course of action, his death or injury is not caused by an accident within the meaning of such a policy. The instant policy contained no provision exempting liability for death resulting from "violation of law" but the court observed that even here the weight of authority is that an insured who is killed or injured under such circumstances and as a direct result of his own criminal acts has not suffered an accident.

MALPRACTICE ACTION— STATUTE OF LIMITATIONS COMMENCES TO RUN WHEN COURSE OF TREATMENT ENDS

Borgia v. City of New York, 216 N.Y.S.2d 897 (1961)

In an action based on acts of malpractice alleged to have taken place in a municipal hospital, the City of New York contended that the plaintiff did not comply with the statute requiring that in any case founded upon tort where notice of claim is required as a condition precedent to the commencement of the action against a public corporation, such notice of claim shall be given ninety days after the claim arises. There were a number of different acts of malpractice on varying dates commencing with the infant's entry in the hospital on October 10, 1956, the last such act of malpractice alleged to have taken place on November 25, 1957. However, the infant was not discharged until February 14, 1958, and on April 10, 1958, notice of claim was served on the City of New York. Thus, the question before the court was a determination of when the claim arose and when the ninety days started to run within which the notice of claim had to be filed on behalf of the plaintiff. After reviewing various authorities the court concluded that the statute of limitations against malpractice starts to run when a course of treatment ends without regard to whether there have been negligent acts throughout the course of the treatment. Similarly, the ninety days within which the claim had to be filed on behalf of the plaintiff with the City of New York started to run February 14, 1958, the day the infant was discharged from the municipal hospital and, therefore, the claim was filed well within the prescribed time.

**MOTOR VEHICLES–
COLORADO SAFETY
RESPONSIBILITY LAW HELD
UNCONSTITUTIONAL**

People v. Nothaus, 363 P.2d 180 (Colo., 1961)

Nothaus was tried and convicted for driving a motor vehicle while under a suspension order issued by the State Motor Vehicle Department, Nothaus having failed to deposit security as required by the Colorado safety responsibility law. By a divided court the Supreme Court of Colorado held that the requirement of the safety responsibility law that there be suspension of the license of each operator and all registrations of each owner of motor vehicles involved in an accident in which there is personal injury or $50 or more property damage, unless such person deposits security, does not protect public safety, health, morals or welfare, denies the operator due process and, therefore, is unconstitutional. Justices Doyle and McWilliams dissented.

**NEGLIGENCE–
CUSTOMER'S CONTRIBUTORY
NEGLIGENCE PRECLUDES
RECOVERY IN SLIP AND
FALL ACTION**

Gall v. Great Atlantic & Pacific Tea Company, 120 S.E.2d 378 (Va., 1961)

Plaintiff customer brought suit against A. & P. to recover damages alleged to have arisen by reason of the negligence of A. & P. while she was in its store as an invitee. The jury returned a verdict for the defendant, on which the trial court entered judgment, and the plaintiff appealed contending, among other things, that the trial court had erred in giving an instruction on contributory negligence. From the evidence it appeared that the plaintiff entered an A. & P. Supermarket and while in the produce department she slipped and fell as a result of stepping on some grapes lying on the floor. She did not look at the floor before stepping on the grapes and was unable to state how many there were. On appeal she argued that she had the right to assume, in the absence of warning, that the defendant had performed its duty to keep the premises in a reasonably safe condition for her visit and she was not required to be on the lookout for obstacles or objects in passageways or aisles. The Supreme Court of Appeals of Virginia held that the duty of the defendant A. & P. was to exercise reasonable care to keep its premises in a reasonably safe condition and to warn persons invited to use its premises of dangers which are known to it and are unknown to the invitee, but that such warning is not required where the condition is open and obvious and is patent to a responsible person exercising ordinary care for his own safety. The court observed that the defendant A. & P. was not an insurer of the plaintiff's safety and that while it is true the plaintiff was not required to look constantly at the floor, she was not relieved of the duty to exercise ordinary care for her own safety and she could not blindly walk into a dangerous condition which is open and obvious to a person who exercises ordinary care. Accordingly, an instruction on contributory negligence was proper.

**NEGLIGENCE–
MINORS HELD TO ADULT
STANDARDS OF CARE WHEN
OPERATING AUTO, AIRPLANE
OR POWER BOAT**

Dellwo v. Pearson, 109 N.W.2d 859 (Minn., 1961)

Plaintiffs sued for injuries allegedly received due to the negligence of a twelve year old defendant in driving a power boat behind a boat in which plaintiffs were fishing so that the power boat propeller caught a fishing line causing the rod to jerk and the reel to disintegrate. The trial court instructed the jury that the defendant was to be judged by the standard of care of a child of similar age rather than that of a reasonable man and this was one of the questions in issue on appeal following a general verdict for the defendant. The Supreme Court of Minnesota reviewed the rationale of the instruction and concluded that while minors are entitled to be judged by standards commensurate with their age, experience and wisdom when engaged in activities appropriate to their age, experience and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle, for example, to observe any other standards of care and conduct than those expected of all others. Accordingly, the court held that in the operation of an automobile, airplane or power boat, a minor is to be held to the same standard of care as an adult.

NEGLIGENCE— SWIMMER'S $473,000 AWARD REVERSED

Biltmore Terrace Associates v. Gegan, 137 So.2d 631 (Fla., 1961)

A minor guest of a hotel and his father brought suit for injuries received by the minor guest when he dove off a four foot wall at the edge of the ocean and was permanently injured when he struck bottom. The evidence revealed that the ocean side of the patio-pool area of the hotel was enclosed by a wall and that on the day of the accident the pool was closed because of bad weather, hence, no life guard on duty nor any other person of authority present to oversee the recreation area. The minor guest and a companion climbed over the wall, stood on the slanted edge of the opposite side of the wall and dove into the ocean, which, because of the wind and tide, splashed against the bulkhead which was the east end of the patio-pool area. The minor guest and his father were awarded $473,000 (the amount not appearing in the reported case) and, on appeal, the District Court of Appeal of Florida reversed. The appellate court held that the trial court was under duty to direct a verdict for the defendant by reason of the failure of the plaintiff to show negligence on the part of the hotel owner and for the further reason that the minor guest was guilty of contributory negligence. The court commented that inasmuch as negligence grows out of a breach of duty, it must first be determined the duty which the hotel owed to its guests. The court concluded that this duty was to exercise all ordinary and reasonable care and prudence to have and maintain the place and all appliances intended for the use of its patrons in a reasonably safe condition for all ordinary, customary and reasonable uses to which they might be put by patrons and to use ordinary and reasonable care for the safety of its patrons, but the hotel is not an insurer of the safety of its patrons. There is no presumption of negligence on the part of the operator of a resort merely on the showing that an injury has been sustained by one rightfully on his premises. Further, the failure of the minor guest to "perceive that which would be obvious to him upon the ordinary use of his own senses" amounted to contributory negligence on his part as a matter of law. Judge Milledge dissented. (Contributed by F. E. Gotthardt, Miami, Florida).

STATUTE OF LIMITATIONS— RESIDENT MOTORIST LEAVING STATE DOES NOT TOLL STATUTE

Hammel v. Bettison, 107 N.W.2d 887 (Mich., 1961)

Defendant, in an automobile accident case, was a resident of Michigan at the time of the accident. Some two years later defendant moved to Louisiana. The statute of limitations of Michigan provides that absence from the state shall toll the statute. The non-resident motor vehicle statute provides for substituted service on a non-resident motorist. In response to a plea of the statute of limitations the plaintiff contended that the statute had been tolled and that there was no break in the continuity of the action upon issuance of alias summonses which ultimately resulted in service upon the Secretary of State of Michigan under the non-resident motor vehicle statute. The trial court upheld the plea of statute of limitations being of the opinion that the continuity of the law suit was broken and that the period of limitations was not suspended during the defendant's absence from Michigan. The Supreme Court of Michigan, affirming the action of the lower court, held that during the two years the defendant lived in Michigan personal service could have been made upon her and when she moved to Louisiana service could have been made by service upon the Secretary of State "with the same legal force if served personally within the State". Accordingly, during the entire three year period of limitation, it was possible to make service and suit thereafter was barred. (Contributed by Laurent K. Varnum, Grand Rapids, Michigan, State Editor for Michigan).

WORKMEN'S COMPENSATION— NO PRESUMPTION THAT UNEXPLAINED FALL AROSE OUT OF EMPLOYMENT

Nielsen v. Industrial Commission, 109 N. W.2d 483 (Wis., 1961)

Anna Nielsen worked as a chambermaid at a hotel and while going to the hotel from the hotel laundry where she had had her lunch she fell and injured her left hand. At the hearing on her application for workmen's compensation she testified that she did not know how or why she happened to fall. The Industrial Commission dismissed

the application for compensation and on appeal the Supreme Court of Wisconsin affirmed this action. The court held that every applicant has the burden of proving all facts essential to the recovery of compensation and that if the applicant fails to meet such burden of proof, the application must be denied. Part of that burden of proof is establishing that the accident causing the injury arose out of the employment. The so-called "positional risk doctrine", as applied in Wisconsin, does not embrace within its ambit all falls on the employer's premises and, consequently, no valid presumption can arise that an unexplained fall arises out of the employment.

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Reviewing the LAW REVIEWS

ROBERT J. NORDSTROM*
Columbus, Ohio

EVIDENCE AND PROCEDURE

The June 1961 issue of the Vanderbilt Law Review is a symposium on procedure and evidence in honor of Professor Edmund M. Morgan. All trial lawyers should read this issue from cover to cover for its authors include many of the outstanding evidence and procedure men in this country; indeed, all lawyers would learn much of our legal system by studying some of these articles. For example, one of the articles compares the probability theory and the standard of proof. The ideas expanded in its twenty-plus pages apply to most (if not all) of the "fact decisions" made by lawyers, whether or not they try cases.

Perhaps the oddest thing about this symposium is that it contains an article by Professor Morgan. This appears, say the editors, for two reasons: (1) so that he would not know of this special issue and (2) "more important, ... no symposium on this subject could pretend to be complete without an article by this man." We agree.

No attempt can be made to summarize these twelve lead articles. The best that can be done in this review is to list their titles and authors:

Practical Difficulties Impeding Reform in the Law of Evidence
Edmund M. Morgan

The Hearsay System: Around and Through the Thicket
John M. Maguire

Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy
John T. McNaughton

The Moment of Truth: Probability Theory and Standards of Proof
V. C. Ball

Routine Bifurcation of Jury Negligence Trial: An Example of the Questionable Use of Rule Making
Jack B. Weinstein

Vicarious Admissions and the Uniform Rules
Judson F. Falknor

Hickman v. Jencks—Jurisprudence of the Adversary System
Edward W. Cleary

Rochin and Breithaupt in Context
James R. Richardson

The Objective and Function of the Complaint: Common Law—Codes—Federal Rules
Fleming James, Jr.

The Theory of Criminal Discovery and the Practice of Criminal Law
David W. Louisell

The Next Step: Uniform Rules for the Courts of Appeals
Milton D. Green

Federal Jurisdiction in Personam of Corporations and Due Process
Thomas F. Green, Jr.

14 Vanderbilt Law Review 725-986.

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THE ADVOCATE AND A STANDARD OF ETHICS

Much is being written and even more is being said about "new" and "higher" standards of ethics for the trial lawyer. The author (a Professor of Law at the University of Texas) states his position clearly: standards should be established authoritatively; an attempt to pressure advocates into following non-authoritative standards "is improper . . . . and should not be condoned." A non-authoritative oath is included and discussed.

*Associate Dean and Professor of Law, College of Law, Ohio State University.

The article contains some ideas that will interest trial lawyers. Thode, The Ethical Standard for the Advocate, 39 Texas L. Rev. 575-600.

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TORTS OF CHILDREN

Insurance counsel may want to refresh their recollection of the law of parental liability for the torts of their children. This problem assumes new importance with the growth of the recent "package" homeowner's liability policy. These policies generally cover personal liability and define "insured" so that children under 21 years of age may be covered. This comment will act as a quick review of the problems and provide a ready reference to the recent cases which have attempted answers.

The comment begins with the familiar common-law rule which generally refused to grant immunity to infants for their tortious activity. In addition, there "has been no common-law recognition of any vicarious liability of a parent, as such, for the torts of his child." Some of the exceptions to this common-law rule are discussed but the main thrust of this comment covers:

1. *Vicarious liability by statute.* Twenty states are listed as having statutes imposing liability on parents for the tortious acts of their children. The purpose of these statutes and some scanty evidence of their effect are discussed.
2. *Liability apart from the parental relationship.* A very brief three paragraph discussion of agency, ratification, and encouragement is included.
3. *Parents' personal liability.* Subdivisions of this section cover (1) dangerous instrumentalities, (2) non-dangerous instrumentalities, and (3) power of control.
4. *Operation of motor vehicles.* This section will be of interest to casualty insurance counsel, but again it is only a brief summary of the complex problems which arise. Included are two pages discussing the family purpose doctrine.

This subject could easily—and probably should—be treated in much more detail. Here, however, is a quick survey of area. The Liability of the Parent for the Tort of the Child (Comment), 28 University of Kansas City Law Review, 183-205.

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VENUE IN THE FEDERAL COURTS

The *Gulf Oil* case (1947) recognized the doctrine of inconvenient forum in the federal courts. A year later, Congress passed §1404 (a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In 1959, an article appeared in the INSURANCE COUNSEL JOURNAL (26 INS. COUNSEL J. 117) discussing the factors considered in determining the motion to transfer. This article in the spring (1961) issue of the University of Miami Law Review supplements the earlier article in this Journal.

Six questions are ably answered in this recent article:

(1) What is transfer?
(2) Has transfer under §1404 (a) replaced forum non conveniens?
(3) What are the factors involved in granting or denying transfer?
(4) To what court may an action be transferred?
(5) What procedures are involved in having an action transferred?
(6) What avenues are available for appellate review of transfer orders?

The discussion of the third question contains a full citation to recent cases. It also lists 17 factors which antedate *Gulf Oil* but which are applicable to §1404 (a) transfers under the phrase "interest of justice". In this connection, the paragraphs on *Hoffman v. Blaski* (363 U.S. 335) should be read by lawyers who have the problem of a §1404 (a) transfer. The author's conclusion is that the section now has received a restricting construction and that Congress should amend it to liberalize its effect. If he is correct in his conclusion and if Congress does not liberalize §1404 (a), then plaintiffs will continue relatively free in

their choice of forum. (See the article in 61 Colum. L. Rev. 902, cited below under *Procedure,* analyzing the necessity of personal jurisdiction over defendant in *the transferor court* as a prerequisite to transfer; see also the comment in 36 Ind. L. J. 344, cited below under *Procedure,* discussing the *Blaski* case.) Masington, Venue in the Federal Courts—The Problem of the Inconvenient Forum, 15 University of Miami Law Review 237-257.

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THE FORGOTTEN SPONGE AND THE STATUTE OF LIMITATIONS

A student comment deals with this case: During an operation, Dr. X leaves a foreign substance in Mr. A's wound. Mr. A does not discover the substance until after the number of years found in the applicable statutory period has expired. The comment answers the question: When does the statute of limitations begin to run in a "foreign substance" case.

The author states that the "general rule" begins the statutory period in a malpractice action at the time the foreign substance is introduced into the human body. However, the following exceptions are discussed: contract recovery (can plaintiff phrase his petition in terms of quasi-contract rather than tort?), the doctrine of continuing negligence, the idea that the operation is not complete until all appliances have been removed, fraudulent concealment (must there be knowledge on the part of the doctor?), and the discovery doctrine. The Forgotten Sponge and the Statute of Limitations (Comment), 1 Washburn Law Journal 257-273.

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PERSONAL INJURY AWARDS—A SURVEY

The May issue of the Cleveland-Marshall Law Review contains nine articles surveying the size of recent personal injury awards. The type of injuries covered are: head, eye, ear, back, spine, arm, hand, and leg. Also included are whiplash and burn damage. This reference to several scores of cases may be valuable to the trial lawyer. 10 Cleveland-Marshall Law Review 193-301.

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1240 Ontario Street
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INSURANCE ANTITRUST EXEMPTION

This article explores two rather specific problems:

1. What degree of state regulation is required, under the McCarran-Ferguson Act, to exclude application of the federal antitrust laws?
2. To what extent have the states actually achieved the requisite degree of regulation?

Discussion of these problems is presented in the background of the *South-Eastern Underwriters* case which held that the business of insurance transacted across state lines was interstate commerce and subject to federal antitrust laws. The McCarran-Ferguson Act, of course, returned to the states much of this regulatory power.

The main thrust of the article then seeks answers to the two questions posed above. As to the first, the author concludes that the states must at least: (1) have legislation which parallels the federal antitrust laws as to coverage; (2) establish adequate administrative agencies to administer and enforce these laws; and (3) have provision for bringing suitable proceedings and for enforcing the applicable decrees.

In answering the second question, the author discusses weaknesses in current state rate regulations (vague standards, rating bureau domination, deviations, independent filings, unscientific rate-making procedures, and inadequate staff), tie-in sales, and possible solutions under present law. This article (with its 249 footnotes) should be read by insurance counsel. Wiley, Pups, Plants and Package Policies—or the Insurance Antitrust Exemption Re-examined, 6 Villanova Law Review 281-352.

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ARTICLES AND COMMENTS

The titles of additional law review writings are listed below for the lawyer who may have the specific problem in his office:

Evidence

1. Collateral Estoppel as Applied to Statements made by Attorneys at a prior Trial Between the Same Parties (Comment), 21 Md. L. Rev. 130-138 (Maryland Law Review, Inc., Redwood and Greene Streets, Baltimore 1, Md.).
2. Cross-Examination of Witnesses (Author: Earl T. Thomas), 32 Miss. L. J. 241-255 (Mississippi Law Journal, University, Miss.).

Insurance

3. Presumption of Death in Life Insurance Cases (Comment), 14 Univ. of Fla. L. Rev. 85-89 (Room 116, Law Building, Univ. of Florida, Gainesville, Fla.).
4. Employee Life Insurance Furnished by the Employer as Mitigating Damages Against the Employer in an Action for Wrongful Death, 15 Wyo. L. J. 232-237 (Univ. of Wyoming College of Law, Laramie, Wyo.).
5. Liability Insurance: Recovery of Punitive Damages (Comment), 14 Okla. L. Rev. 220-222 (Univ. of Oklahoma College of Law, Norman, Okla.).

Jurisdiction

6. Federal Jurisdiction: Problems Involved in the Discretionary Use of the Abstention Doctrine (Comment), 1961 Wis. L. Rev. 450-466 (Univ. of Wisconsin Law School, Madison, Wis.).

Medicine

7. Medical Literature for Lawyers (Author: William J. Curran), 47 Va. L. Rev. 666-673 (Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.).
8. Justifiable Abortion—Medical and Legal Foundations (Author: Eugene Quay), 49 Geo. L. J. 395-538 (Georgetown Univ. Law Center, 506 E. Street, N. W., Washington 1, D. C.).

Procedure

9. Separation of Issues of Liability and Damages in Personal Injury Cases (Comment), 46 Iowa L. Rev. 815-831 (State Univ. of Iowa College of Law, Iowa City, Iowa).
10. Designation of Defendants by Fictitious Names—Use of John Doe Complaints (Comment), 46 Iowa L. Rev. 773-785 (State University of Iowa College of Law, Iowa City, Iowa).
11. Some Aspects of the Merger of Law and Equity (Author: John L. Garvey), 10 Catholic Univ. of America L. Rev. 59-74 (Catholic Univ. of America Law Review, Washington 17, D. C.).
12. Making Courts Efficient (Author: Charles E. Clark), 8 U.C.L.A. L. Rev. 489-496 (Univ. of California School of Law, Los Angeles, Calif.).
13. Summary Judgment for Plaintiffs in Negligence Actions in New York, 25 Albany L. Rev. 278-288 (Albany Law School, 80 New Scotland Ave., Albany 8, N. Y.).
14. Transfer in the Federal Courts in The Absence of Personal Jurisdiction (Comment), 61 Colum. L. Rev. 902-920 (Kent Hall, Columbia Univ., New York 27, N. Y.).
15. Transfer of Civil Actions under 28 U. S. C. §1404 (a) (Comment), 36 Ind. L. J. 344-359 (Indiana Univ. School of Law, Bloomington, Ind.).
16. Jury Trial in Interpleader (Comment), 39 Tex. L. Rev. 632-642 (Texas Law Review, Inc., University of Texas School of Law, Austin, Texas).

Torts

17. The Basis of Liability for Prenatal Injuries and for Wrongful Deaths Arising Therefrom (Comment), 1960 Univ. of Ill. L. Forum 593-600 (Univ. of Illinois College of Law, 125 Law Bldg., Urbana, Ill.).
18. Treatment of Damages for Death by Wrongful Act in Suits against Common Carriers: the Place of Injury Rule (Comment), 10 Catholic Univ. of Am. L. Rev. 88-95 (Catholic Univ. of America Law Review, Washington 17, D. C.).
19. State Wrongful Death Acts and Maritime Torts (Comment), 39 Tex. L. Rev. 643-660 (Texas Law Review, Inc., University of Texas School of Law, Austin, Texas).
20. The Duty of an Automobile Passenger to Exercise Care (Comment), 37 N. Dak. L. Rev. 282-293 (Univ. of North Dakota School of Law, Grand Forks, N. Dak.).
21. Airplane Noise: Problem in Tort Law and Federalism (Comment), 74 Harv.

L. Rev. 1581-1596 (Harvard Law Review, Cambridge, Mass.).

22. Intent and Related Problems in Plagiarism (Author: Leon R. Yankwich), 33 S. Calif. L. Rev. 233-259 (Southern California Law Review, Univ. of Southern California, University Park, Los Angeles 7, Calif.).
23. Tort Actions Between Members of the Family—Husband and Wife — Parent and Child (Comment), 26 Mo. L. Rev. 152-217 (Univ. of Missouri School of Law, Columbia, Mo.).
24. Federal Tort Claims Act (Comment), 32 Miss. L. J. 276-282 (Mississippi Law Journal, University, Miss.).
25. The Tort Claims Act Revisited (Author: Irvin M. Gottlieb), 49 Geo. L. J. 539-592 (Georgetown Univ. Law Center, 506 E. Street, N.W., Washington 1, D.C.).

Trial

26. Some Approaches to the Instructional Problem (Author: Judge Paul W. White), 40 Neb. L. Rev. 413-432 (Univ. of Nebraska College of Law, Lincoln, Neb.).
27. Juries and the Sanctity of their Verdicts (Comment), 63 W. Va. 261-268 (West Virginia Univ. College of Law, Morgantown, W. Va.).

WRITINGS OF LOCAL INTEREST

Alabama

Governmental Responsibility for Tort in Alabama (Authors: Albert W. Copeland and Euel A. Screws, Jr.), 13 Ala. L. Rev. 296-342 (Univ. of Alabama School of Law, University, Ala.).

California

Governmental Immunity from Tort Liability (Comment), 34 S. Calif. L. Rev. 346-361 (Southern California Law Review, Univ. of Southern California Press, University Park, Los Angeles 7, Calif.).

Consortium (Comment), 34 S. Calif. L. Rev. 334-346 (Southern California Law Review, Univ. of Southern California Press, University Park, Los Angeles 7, Calif.).

Posthumous Privilege in California (Comment), 8 U.C.L.A. L. Rev. 606-633 (Univ. of California School of Law, Los Angeles, Calif.).

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Connecticut

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Report Of The Defense Research Committee—1961

STANLEY C. MORRIS, *Chairman*
Charleston, West Virginia

THE situation of personal injury defendants *vis-a-vis* personal injury plaintiffs deteriorated in most of our states in the twelve year period beginning with 1947, although not at a uniform speed in every year. So also defense trial lawyering as compared to plaintiffs' trial lawyering.

The year 1958 was one of measurable betterment for the defense and of decelerating deterioration. The last two and one-half years have been a period of accelerating achievement for the defense.

In the last prior report of this Committee, we said:

> There is * * * wide-spread grass roots dissatisfaction with the gimmicks in "the Hollywood type of trial" on the part of such cross-section Americans as family purpose automobile owners, jurors, surgeons, clerics, judges.
>
> There is widespread determination that the gimmicks must go. * * *
>
> Outside the court rooms there have also been important developments promising material betterments of the situation.
>
> * * * the climate of opinion in the country has become auspicious for the carrying on of an aggressive program for the betterment of the tort claims situation in this country.[1]

That what we there said was well-founded is supported by a look at what has happened in the past twelve months. The Defense Research Institute, Inc. was organized as a non-stock, non-profit corporation under the laws of Wisconsin on August 30, 1960, as a direct outgrowth of the work of this committee and under the sponsorship of the International Association of Insurance Counsel. Since then, thousands of man-hours of voluntary effort have been given to its program by its constantly-increasing lawyer members. It has opened an office and has employed a competent full-time business manager and a clerical assistant. It has assumed responsibility for and continues to publish For The Defense, a newsletter which was initiated by this committee in March, 1960.

This newsletter is currently being utilized by its readers, to an increasing degree, as a means of accelerated communication between them. For example, a copy of the opinion in the very important case of *Affett v. Milwaukee & Suburban Transport Co.*, 106 N.W.2d 274 (Wisc., Nov. 29, 1960) was in the hands of the editor of For The Defense three days after its rendition and was quoted in the next issue.

The Institute has also initiated the production of monographs. Already published and distributed are "The Revolt Against 'Whiplash'" and "Products Liability". They have been enthusiastically received. Present plans call for the production of at least three more such monographs during the current calendar year. There is also in operation a program whereby reprints of law review articles and other papers, not of monograph magnitude, will be produced and circulated among members of the Institute.

Casualty insurers also put into operation as of January 23, 1961 a central Defense Information Office, a feature of which is a brief bank currently being accumulated by an experienced law librarian. A defense lawyer may, in a given case, by calling upon the insurer which he represents, have the benefit of the resources of the brief bank.

LOSS PAYERS AND UNIVERSITY RESEARCHERS TAKE A LOOK AT TORTS TODAY: THE INJURY INDUSTRY

The Pennsylvania State Chamber of Commerce has had a committee at work on the costs of casualty insurance since mid-1959. This committee of forty-five members began an analysis of the various factors which were driving these costs up at the time the committee was created. A short time before our 1960 report, and too late to be referred to in it, this committee of the Pennsylvania Chamber made a detailed report. The foreword to this report reads in part as follows:

[1] Report of the Defense Research Committee—1960. 27 INS. COUNSEL J. 535.

Why is it, for example, that a family man in Washington County who drives his car to work pays up to 100% more for liability insurance than he would in Lancaster County—when Lancaster had the highest number of traffic deaths and the third highest number of accidents?

This study suggests some of the reasons. For one thing, jury awards in Washington County were the highest of all twelve counties—204% above the average. More than 25% of the nearly $6 million awarded by juries in the surveyed areas was made by Washington County juries, despite the fact that the county ranked ninth out of the twelve in per capita buying income. . . .

The jury system is still the best means of obtaining justice for the litigants in damage suits. As observed above, the only fair verdict in some cases might be a high one. But if juries, in the misguided belief that the insurance company will foot the bill, hand down excessive verdicts, it is the policyholder who may never have had an accident, or occasion to make a single claim, in years of safe driving, who must bear the brunt.[2]

It is not surprising that this report drew widespread attention and led to the investigation by the committee of other facets of the personal injury problem. In February, 1961, the Chamber reported the fact that it had placed 8,000 car-cards in the buses and trolleys of various transit lines in the state, reading in part as follows:

You (yes, *You*) Can Cut Accident Insurance Costs:
Be Fair—as a claimant or juror . . .
Be Careful—fewer accidents mean lower premiums . . .
Remember—you pay the freight for padded and fake claims.
This message sponsored by Pennsylvania State Chamber of Commerce, Harrisburg, Pa.[3]

In 1960, the Illinois State Chamber of Commerce turned its attention to the insurance problems of its members. It called a statewide conference on the situation, which was held on November 22, 1960. A number of noted addresses were made on that occasion, one of which, dealing with non-meritorious personal injury claims, has been published.[4]

The Greater Miami, Florida, newspapers revealed early in 1958 that bodily injury coverage which could be purchased in Tampa for $33.62 cost the Dade County motorist $71.70. They also disclosed the greater incidence of traffic deaths and personal injuries than elsewhere in the state. The fact that Dade County's courts were flooded with personal injury cases making astronomical demands and resulting in a high frequency of verdicts in large amounts was also brought out.

The methods and tactics pursued by personal injury claimants and their attorneys also soon came under scrutiny.

A Citizens' Advisory Committee on Highway Safety was created as was also a citizens' committee to deal with the other elements in the situation which by then had thoroughly aroused the people of the county.

All this was disclosed in "A Community Aroused—How Dade County, Florida is Solving Its Traffic Safety and Fraudulent Claims Problems", which was published within a few days after the completion of our 1960 report. In his capacity as a member of the American Bar Association's Committee on Traffic Safety, Mr. Justice Tom C. Clark, of the United States Supreme Court, furnished a foreword for this brochure. It contains facsimile reproductions of newspaper stories, and statements by civic leaders.

The net result of the developments reported in the brochure was a decided reduction in both traffic accidents and in personal injury law actions growing out of such accidents. Plaintiffs' verdicts in non-liability cases and excessive jury verdicts also became less frequent.

Again, the tort claims situation in the city of Houston was given the attention of The Houston Press, in that city, which, beginning on April 26, 1961, ran a series of articles dealing with various facets of the problem.

From the vantage point of the University of Michigan campus, two researchers report (emphasis supplied):

In a recent year, as a nation, we spent almost $4 billion in compensating victims of personal injury accidents. By comparison, during that same year about the same amount was paid in wages and

[2]Jury Awards and Automobile Insurance Rates in Twelve Pennsylvania Counties, 1953 Through 1958, April 1960, I, ii.

[3]Pennsylvania State C. of C., News Report, Jan.-Feb., 1961, 9.

[4]Coleman, The Way of the Transgressor is "Easy", 28 INS. COUNSEL J. 198 (1961).

salaries to all employees in motor vehicle and equipment manufacturing; an equal sum was spent for all highway construction by federal, state and local governments combined; and half that amount was received by farmers for the value of their food grain production.

$4 billion is only a rough estimate. * * * *In addition to these payouts to victims, over $1.4 billion was spent getting the dollar to the victim.* * * *

While the idea of an "injury industry" may be disturbing to many of us, we cannot escape the fact that a significant portion of our economy is devoted to the business of compensating the injured. The figures themselves are not surprising. *What is surprising is that so little is known about so large an economic activity.*

***Meanwhile, bodily injury compensation continues along without much organized attention.[5]

Judges and defense lawyers were already cognizant of various facets of the tort claims situation in this country somewhat comparable to industry operations.

Under date of January 21, 1958, the Honorable Bernard Botein, Presiding Justice, Appellate Division, First Department, New York, made an address in which he said:

> * * * the specialists in personal injury litigation are well satisfied with things as they are. * * * they maintain an inventory that never decreases in value.[6]

Mr. Justice Botein's observations as to case inventories of personal injury plaintiffs' specialists have been corroborated by the fact that some of them have publicly reported the possession of inventories of hundreds of cases. The 1960 results in the railroad field are reported by a knowledgeable spokesman for railroad trial lawyers:

> * * * we are again directing attention toward a relatively small group of attorneys, *one hundred and nine* in number, to whom the railroad employee casualty lists means big business. The statistics are convincing. The firm heading the list as the leading money-maker did $1,941,000.-00 in railroad business in 1960. It realized this amount on 127 suits and claims. If this firm closed their "shop" to new cases at the beginning of this year * * * it would still have approximately three years' work in disposing of the 335 cases which were left pending at the end of the year.
>
> The ten firms leading the list on basis of dollar production, cashed in for themselves and their clients just under *nine and one-half million dollars* during the year. The *one hundred and nine* firms on this select list extracted from railroad defendants over *twenty-three and one-half million dollars*, representing the disposition of 1,556 claims and suits of injured employees. These firms left pending and unsettled at the end of 1960, 3,418 cases. It is interesting to speculate on the gross "liability" represented by these pending cases. It is purely a guess, but on an average basis as compared with 1960, *fifty million dollars* would probably not miss it far.[7] * * * (Emphasis added)

Knowledgeable defense trial lawyers are also quite cognizant of the fact that there is a constant effort to extend the periphery of torts by bringing about the "birth of new torts", roughly comparable to the development by industry of new products.

In point are the statements of one of the country's leading lawyers specializing in the handling of tort claims:

> Much has been accomplished during this last decade. One notes that the law concerning charitable corporations has changed, a part of the Workmen's Compensation Act which affected common-law actions was invalidated, the rights of infants for injuries prior to birth defined, the attractive nuisance doctrine revitalized, proximate cause given reality, anomalous rules involving the Wrongful Death Act wiped out, the veil of immunization of government for tort liability lifted, the Scaffold Act upheld, exculpatory clauses in leases validated—and subsequently invalidated by statute—the rights of firemen against owners and possessors of premises redefined, and wives have been held to have the same cause of action for loss of consortium as their husbands.[8]

Recent and timely are also the comments of the able judge of one of the more important appellate courts of the country:

[5] Conard and Voltz, The Economics of Injury Litigation, Mich. State B. J., August, 1960.

[6] New York Law Journal, January 22, 1958.

[7] 46 The Bulletin, General Claims Division, Association of American Railroads 74 (June, 1961).

[8] James A. Dooley, Ten Years of Developments in the Law of Negligence Torts, 10 DePaul Law Review 503, 505 (1961).

> At a time like the present, with constantly enlarging recoveries both in scope and amount in all fields of negligence law, and when an influential portion of the Bar is organized as never before to promote ever increasing recoveries for the most intangible and elusive injuries, little imagination is required to envision mental illness and psychosomatic medicine as encompassed by the enlargement of the coverage of negligence claims to include this fertile field.[9]

A knowledgeable lawyer and a distinguished judge, therefore, testify each from his own viewpoint to the fact that the imaginativeness and audacity of plaintiffs' personal injury specialists are constantly inching outward the periphery of tort liability.

While the ambit of the tort concept is thus constantly expanding horizontally, the growing awareness of personal injury and property damage claimants that law actions are, under contingency fee arrangements, "for free", serves massively to increase both the number of claims asserted and the dollar total of claims.

That such is the case is capable of clear documentation. There have also been apparently planned upsurges on a massive scale of litigation in tort situations already in existence. The medical profession finds itself staggering under a constantly increasing burden of malpractice litigation.[10]

The like is also true in the products liability field, in which plaintiffs' lawyers some months ago opened a "Products Liability Exchange" supplementing their long existing general brief bank operation. The creation of this added medium of communication between plaintiffs' lawyers drew the attention of the Wall Street Journal in a noteworthy news article:

> Directly concerned with this increased litigation is a 7,000-member group of lawyers called the National Association of Claimants Counsel of America. These trial lawyers are conducting an intensive campaign on behalf of clients who suffered damages caused by manufactured products. One key weapon. A Products Liability Exchange puts NACCA members in touch with others who have handled cases involving—at the present time—691 different items. . . .
>
> Household insecticides, some made with chemicals whose effect on humans hasn't been determined, may also lead to product suits. Rattling off a diverse list of symptoms a housewife can acquire from some of these chemicals, a NACCA lawyer told a recent convention meeting that "if you can't fit your clients' problems into this list, you're missing the boat."[11]

Writing in 1954, Dean William L. Prosser of the University of California School of Law, wrote in a book review:

> * * * Here is a book which tells the plaintiff's counsel, in three volumes and in great detail, how to play upon that [jury] weakness, how to invest this working capital in a production designed to * * * cash in. Since the investment is a costly one, demanding considerable resources of the lawyer's own, here is also the explanation of why personal injury work is a specialty, big business, and not for the small lawyer. * * *

He was speaking at the time chiefly of investment in the fees of expert witnesses, aerial photographs, scale models of landscapes, and the like visual aids.

A law review article by a seasoned observer of the country's tort claims situation also suggests the possibility of the extensive financing by the plaintiffs' lawyers of contingency fee clients, pending possible recovery of damages in their behalf—another industry-like activity.[12]

Again, the publishing of materials to supply the demand of plaintiffs' personal injury lawyers has reached near-satellite-industry proportions. Within the past few years, a flood of books, monographs, periodicals and looseleaf services dealing with tort trial tactics, anatomy, physiology, neurology and other subjects of interest to lawyers involved in personal injury litigation has rolled off the presses. Never in so short a period of time have so many law book pages been produced in a single professional interest.

While some of this material is of use to defense lawyers, plaintiffs' lawyers, no

[9]Battalla v. State, 10 N.Y.2d 237 (1961).

[10]Silverman, Medicine's Legal Nightmare, Saturday Evening Post, April 11, 1959, p. 13; Silverman, Medicine's Legal Nightmare: Doctors in Court, Saturday Evening Post, April 18, 1959, p. 31; Silverman, Medicine's Legal Nightmare: The Source of the Trouble, Saturday Evening Post, April 25, 1959, p. 36; Panel Discussion: Why the Increase in Malpractice Litigation? 27 INS. COUNSEL J. 621 (1960).

[11]Products on Trial, Wall Street Journal, August 31, 1960, p. 1.

[12]Gallagher, Who Owns the Lawsuit?, 27 INS. COUNSEL J. 265 (1960).

doubt, compose by far the larger group of customers. The annual dollar volume of the publishers' yield in this field is obviously quite large. Some of this material falls short of objectivity. Some of the advertising promotive of the sale of such material is hardly subtle in playing on the cash-in-on-negligence motive.

It is believed that what has gone on in 1960-61 in these various areas is symptomatic of a lively and increasing attention to the tort claims situation, in various parts of the country.

In the current IAIC year, university researchers have also given attention to what part of the loss payers' dollar becomes "take home pay" to the accident victim.[13]

The Contingent Fee Under Public Scrutiny and Regulation

There have been, in the last few years, including the current IAIC year, notable published discussions and articles about such fees.[14]

Dissatisfied with the contingency fee situation within its jurisdiction and having found that the lawyers themselves had not met its criticisms, the Appellate Division of the Supreme Court of New York State, First Judicial Department, promulgated in 1957 rules requiring lawyers to report their contingency fee retainers when agreed to and likewise to report the results when work under such retainers was terminated. The right of the court to do so was challenged in a declaratory judgment proceeding. The highest court of New York sustained the rules. Certiorari was sought but was denied by the United States Supreme Court.[15]

Either before or promptly thereafter, bills were introduced in the New York legislature designed to abrogate the existing court rules. Prior to March 23, 1960, one of these bills had passed the lower house of the legislature. On that day, the New York Times and the New York Herald Tribune, in lead editorials, sharply denounced the pending bills. The Herald Tribune, after commending the rules, said:

> We'd like to see follow-up in other areas. Else, as Justice Botein says, "We may be inviting a public revulsion that could shake our courthouses to their foundations."

The pending bills failed of enactment.

A very ably conducted panel discussion at the 1960 ABA Annual Meeting dealing with such regulation was presided over by the Honorable David Van Pelt Bryan, United States District Judge for the Southern District of New York. The discussion ended with the judge and the spokesman for plaintiffs' lawyers agreeing that contingency fees should be "policed". They differed only in that, while the judge felt regulation would have to be by court rule, plaintiffs' lawyers' spokesman felt it might and should be done by voluntary lawyer action.[16]

The "Hollywood Type" of Trial in 1960-61

In our last report, we pointed out increasing public dissatisfaction with the "modern" tort trial, as regards:

1. Exploitation before juries of the term "whiplash injury to the neck" either as a diagnosis or a description as to how an accident may have occurred;

2. *Oral or blackboard* presentations to juries of personal injury plaintiffs' lawyers' estimates on a unit-of-time basis of the dollar amount of damages due their clients on account of pain and suffering;

3. Exploitation before juries of plaintiffs' *ad damnum* demands.

"Whiplash"

We have already reported the publication on March 28, 1961, of the DRI monograph, The Revolt Against "Whiplash". So enthusiastic has been its reception that three printings have already been required. The term is now seldom heard in the courts.

[13]Franklin, Chanin and Mark, Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum. L. Rev. 1 (January, 1961).

[14]Contingent Fees! Bane or Boon? 25 Ins. Counsel J. 453 (1958); Panel Discussion: Compensation Without Fault, Section of Insurance, Negligence, Compensation Law, ABA, Proceedings, 1958, 27-58, at pp. 46-54; Gallagher, Who Owns the Law Suit? 27 Ins. Counsel J. 265 1960); Panel Discussion: Should Contingency Fees in Personal Injury Cases be Subject to Judicial Control? Section of Insurance, Negligence, Compensation Law, ABA, Proceedings, 1960, 189-215; Stichter, The Contingency Fee System Faces Judicial Control and Regulation, 1 For the Defense 25 (June, 1960).

[15]Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43 (certiorari denied), 361 U.S. 74, 80 U.S. Ct. 401, 4 L. Ed. 2d 380 (January 25, 1960).

[16]Panel Discussion: Should Contingency Fees in Personal Injury Cases be Subject to Judicial Control? Section of Insurance, Negligence and Compensation Law, ABA, Proceedings, 1960, 189-215.

The Attempt To Procure Juries to Assign a Dollar Value to Pain and Suffering on a Unit-of-Time Basis

During the current IAIC year, this matter has been discussed in:

1 For the Defense, No. 4, p. 30, "Pre-Trial Motions", No. 8, p. 62, "Preserving the Record—Proper Objections"; 2 For the Defense, No. 3, p. 22, "To Right Thinking Add Sound Semantics."

The basic considerations are that:

1. *No court permits testimony* from any witness, lay or expert, to the dollar value of pain and suffering in a particular case;

2. To permit plaintiffs' counsel to tell the jury orally or per blackboard[17] that they may, nevertheless, find for the plaintiff on such a formula, is to permit counsel and the jury to go outside the record;

3. To permit courts and juries so to do is to abrogate a sound principle of the substantive law of damages.

Within the year, three noteworthy opinions condemning this tactic have been handed down.[18]

The West Virginia Court, in one of the best opinions yet written, expressly holds that:

> ***No testimony as to any money value of pain and suffering is admissible in evidence, no matter how experienced or learned the witness. See *French v. Sinkford,* 132 W. Va. 86, 54 S.E.2d 38; *Raines v. Faulkner,* 131 W. Va. 10, 48 S.E.2d 393; *Yuncke v. Walker,* 128 W. Va. 298, 38 S.E. 2d 410; *Collins v. Skaggs,* 110 W. Va. 518, 159 S.E. 515; *Morris v. Baltimore and Ohio Railroad Co.,* 107 W. Va. 181, 147 S.E. 759; *Landau v. Farr,* 104 W. Va. 445, 140 S.E. 141; *Thomas v. Lupis,* 87 W. Va. 772, 106 S.E. 78; *Trice v. Chesapeake and Ohio Railway Co.,* 40 W. Va. 271, 21 S.E. 1022.***
>
> In our view, the mathematical formula argument is based wholly on speculation, or imaginary inferences, not supported by facts, in reality by supposed facts which could not be received in evidence if offered.[19]***

The cases tolerating the presentation to juries of such subliminally potent but off-record argument disregarded each of the three elements of the situation above pointed out. A series of pitched-battles on a countrywide basis is, nevertheless, still in progress. Some were won by the proponents of this tactic in the year covered by this report.

In Illinois and Texas, intermediate appellate courts have sustained this device, but the courts of last resort have not yet acted. Florida is commonly cited by the proponents as being favorable to this tactic on the strength of *Braddock v. Seaboard Air Line Railroad,* 80 So.2d 662 (Fla., 1955). A careful study of that opinion will, however, reveal that the objections above stated and the analyses of the problem being posed currently were not there presented.

The Third Florida District Court of Appeals, in considering plaintiffs' counsel's attempts to influence juries to calculate pain and suffering in dollars on a unit-of-time basis said:

> ***Recent holdings, for and against the allowance of such arguments, are not grounded on reasons of sufficient force to compel the decision either way. The ultimate course of judicial opinion on the point is not yet discernible. Therefore, in approving the practice now we do not purport to foreclose the question. . .[20]

So that state cannot properly be counted for the formula.

So superior is the reasoning of those cases which condemn such a formula that we believe its use will ultimately be forbidden in most jurisdictions.

Exploitation of Irresponsible and Astronomic Ad Damnum Demands Before Juries

The attack on this abuse scored heavily in 1960-61. The New Jersey Supreme Court's Committee on Rules, reporting on March 24, 1960, stated that:

> The astronomical sums requested in complaints filed today bear no relation whatsoever to any realistic appraisal of the value of the case * * *. At best, they confuse individual clients and the general public alike, and at worst they inject

[17] Almost always, blackboard summations sandwich in between stipulated or proven special damages the wholly unsupported mathematical calculations of plaintiffs' counsel as to the dollar value of their client's pain and suffering.

[18] King v. Railway Express Agency, 109 N.W.2d 509 (Oct. 11, 1960); Affett v. Milwaukee & Suburban Transport Co., 106 N.W.2d 274 (Wisc., Nov. 29, 1960); Crum v. Ward, (W. Va., June 20, 1961).

[19] Crum v. Ward, supra, typewritten pages 13, 14.

[20] Ratner v. Arrington (3rd Dist., Fla.), 111 So.2d 82 (1959).

into the determination of the cause at the trial level a wholly extraneous factor which may thwart a fair and proper determination by a jury. See *Botta v. Brunner,* 26 N. J. 82, 103-105 (1958).[21]***

No doubt influenced by the report of this committee, the court adopted the following rule effective September 7, 1960:

4:8-1. Claims for Relief * * *

Where unliquidated money damages are claimed in any court, other than the county district court, the pleading shall demand damages generally without specifying the amount. Upon service of a written request by another party, the party filing the pleading shall within 5 days after service thereof furnish the requesting party with a written statement of the amount of damages claimed, which statement shall not be filed except on order of the court.

[21]Report of the New Jersey Supreme Court's Committee on Rules, March 24, 1960.

This very simple rule accords the plaintiff a right to make such an *ad damnum* demand as he chooses, but safeguards against its prejudicing the defendant.

The exploitation before juries of astronomical *ad damnum* demands will probably, in the near future, be made the subject of a monograph to be issued by The Defense Research Institute, Inc.

Respectfully submitted, Stanley C. Morris, *Chairman,* Charles E. Pledger, Jr., *Ex-Officio,* David L. Tressler, *Ex-Officio,* Milton A. Albert, Forrest A. Betts, A. Lee Bradford, E. D. Bronson, L. J. Carey, Sanford M. Chilcote, Alvin R. Christovich, Jr., Gordon R. Close, E. A. Cowie, Frank X. Cull, C. A. DesChamps, Kraft W. Eidman, J. A. Gooch, Josh H. Groce, Edson L. Haines, Robert P. Hobson, Lon Hocker, Wyatt Jacobs, William E. Knepper, Edward W. Kuhn, R. Newell Lusby, Franklin J. Marryott, Robert T. Mautz, Royce G. Rowe, Edward H. Schroeder, Joseph L. Spray, Wayne E. Stichter, Willas L. Vermilion, George I. Whitehead, Jr., George W. Yancey.

Report Of The Financial Responsibility Committee—1961

MARCUS ABRAMSON, *Chairman*
New York, New York

WITH forty-seven state legislatures plus Puerto Rico, Virgin Islands and the Congress in session, the 1961 legislative season saw the introduction of many bills relating to automobile financial responsibility.

Compulsory — Compulsory automobile liability insurance bills were proposed in twenty-three states[1] as well as in Puerto Rico and the Virgin Islands. None of these bills was passed and no new compulsory law enacted. However, the North Carolina compulsory statute which would have expired by its terms on May 15, 1961, was extended indefinitely. In Connecticut compulsory insurance legislation was strongly pressed. The industry countered this threat by the introduction of the industry program consisting of provisions to strengthen the financial responsibility law and also providing for mandatory uninsured motorist coverage with the right of rejection by the insured. The session of the legislature closed without the enactment of either compulsory or the industry program nor of the many other bills that were introduced bearing on this subject.

While compulsory automobile liability insurance legislation also failed to pass the legislature in Oregon, Senator Straub, the introducer of the legislation, has launched an initiative petition campaign to get the question of compulsory automobile liability insurance on the ballot in 1962. The initiative petition follows closely the bill that he sponsored in the 1961 session. Of interest in this connection is the fact that the Oregon AFL-CIO at its recent annual convention adopted a resolution favoring an initiative petition for compulsory insurance. This resolution includes a provision that the compulsory proposal shall provide for a monopolistic state fund.

The usual numerous bills affecting the Massachusetts Compulsory Automobile Liability Insurance Law included bills, sponsored by the Insurance Commissioner, the Registrar of Motor Vehicles and the Public Safety Commissioner, to repeal the statute and to substitute a financial responsibility law or an unsatisfied claim and judgment fund law. None of these bills was passed.

Unsatisfied Judgment Funds — Legislation for unsatisfied judgment funds, patterned after the Maryland or New Jersey Laws, were introduced in eight legislatures.[2] None was enacted. A bill proposing such a fund for the District of Columbia is pending in the Congress.

The Maryland Unsatisfied Claim and Judgment Fund Law was amended (1) to exclude any rights of subrogation by an insurer, (2) to provide for deduction from the maximum amount payable from the fund any amount which the claimant is entitled to receive under a collision policy, (3) to prohibit claims by an uninsured motorist for injuries received while riding in an uninsured motor vehicle owned by him or for damage to or destruction of an uninsured motor vehicle owned by him, and (4) to vest in the Unsatisfied Claim and Judgment Fund Board, instead of the Motor Vehicle Commissioner, the authority to calculate annually the amount needed for the purposes of the Fund for the coming year.

The New Jersey Unsatisfied Claim and Judgment Fund Law was amended (1) to permit a guest occupant in a motor vehicle owned or operated by an uninsured motorist, heretofore excluded, to recover from the Fund and (2) to bar claims by anyone operating or riding in a motor vehicle which he had stolen or participated in stealing or operating a motor vehicle without the permission of the owner. By separate enactment the New Jersey Unsatisfied Claim and Judgment Fund Board was given authority to hire attorneys to collect from uninsured motorists.

Uninsured Motorist Coverage — Mandatory uninsured motorist coverage statutes

[1]Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Maryland, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Wisconsin.

[2]Connecticut, Georgia, Illinois, Michigan, Montana, Ohio, Pennsylvania, Rhode Island.

were proposed in twelve states.[3] Such new laws were passed in Florida and North Carolina. Both of these laws provide for the right of rejection of the coverage by the insured and the Florida law also provides that a motorist who was insured but whose insurer became insolvent shall also be considered an uninsured motorist for the purposes of the statute.

Financial Responsibility Laws — Amendments to the financial responsibility laws were introduced in thirty states.[4] Enacted legislation included increases in the required limits under the laws to 10/20/5 in five states.[5]

The property damage minimum was increased from $50 to $100 in three states.[6] (A proposed increase from $50 to $200 was vetoed in Wyoming). In addition, in Tennessee some of the provisions for strengthening the Financial Responsibility Law which were enacted in the 1959 session were repealed. These included the increase from one year to two years during which security must be maintained on deposit and the period of suspension for failure to deposit security, requirements relating to impoundment, and the requirements for evidence of insurance following certain moving traffic violations. Such moving traffic violations were apparently limited this year to drag races, reckless driving and speeding.

In Nebraska, where the industry program for strengthening the Financial Responsibility Law was also enacted in 1959, the provision for evidence of insurance upon conviction of certain moving traffic violations was repealed.

Studies — The Arkansas legislature directed the Legislative Council to study the problem of the financially irresponsible motorist and to prepare recommendations for the next session.

In Georgia, a legislative subcommittee was set up to make a study of the problems caused by the financially irresponsible motorist and to report to the next session.

The Oklahoma Senate adopted a resolution submitting a proposal to the Executive Committee of the State Legislative Council for an interim study of the potentialities of the "Uninsured Drivers Fund" for Oklahoma, looking toward remedial legislation in 1963.

In the State of Washington, the Senate adopted a resolution requesting the Legislative Council to undertake a study of the Saskatchewan Law and to report to the next session with draft of a bill for a similar system for the State of Washington. Since this resolution was adopted in only one House, it does not constitute a mandate on the Legislative Council.

Of interest in connection with this subject is the decision of the Colorado Supreme Court[7] holding the provision of the Colorado Financial Responsibility Law authorizing the Director of Revenue to suspend the license of a motorist involved in an accident who fails to deposit security, to be unconstitutional. Both the Attorney General of the State and attorneys representing various branches of the insurance industry, filed petitions for a rehearing of this decision. On July 1, 1961, the petitions for rehearing were denied.

Apparently on the basis of the Colorado decision, an action is pending in the lower courts in Arizona to test the constitutionality of the Arizona Financial Responsibility Law.

Respectfully submitted, Marcus Abramson, *Chairman*, W. Neal Baird, *Vice-Chairman*, Palmer Benson, Lawrence Burns, Jr., Robert C. Carlson, James Dempsey, James A. Dixon, James B. Donovan, John C. Graham, Charles Kelly Guild, Q. C., J. T. Hammond, W. J. Kemper, Charles M. Kirkham, John W. Maddox, Edward T. O'Neill, H. Beale Rollins, William Rosenberger, Jr., Philip J. Schneider, James T. Smith, Oliver P. Stockwell, William E. Suddath, Jr., J. Kirby Smith, *Ex-Officio*.

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[3]Alabama, Connecticut, Florida, Hawaii, Montana, Nevada, New Mexico, North Carolina, Ohio, Rhode Island, Texas, West Virginia.

[4]Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Washington, Wisconsin, Wyoming.

[5]Arizona, Idaho, Utah, West Virginia, Wyoming.

[6]Idaho, Iowa, Tennessee.

[7]People of the State of Colorado v. Nothaus, July, 1961.

Report Of The Nuclear Energy Committee

JAMES P. ALLEN, JR., *Chairman*
Boston, Massachusetts

THE members of this committee have been interested in the development of the law in the nuclear energy field. We had planned to prepare two articles for the JOURNAL concerning items (1) and (2) below, but these matters had not progressed to a point during the year which seemed suitable for discussion in an article in the JOURNAL. We direct attention to several topics we think may be of interest to all members of the Association.

(1) PRIVATE INSURANCE AND FREE GOVERNMENT INDEMNITY. Although in 1956 insurers responded to the calls for help on the part of industry for adequate liability insurance by establishing pools of mutual and stock insurers with a capacity of $60,000,000 per risk against the unique nuclear energy hazard, the assembled capacity has not been used in material amounts. The underlying financial protection required, pursuant to United States Atomic Energy Commission formula, of licensees operating reactors and critical facilities which are indemnified pursuant to 170 (a) and (b) of the Price-Anderson Act is quite inadequate in the view of liability insurers. In their judgment, the extremely low levels established have had the effect of substituting free government indemnity for private insurance.

In addition, private licensees engaged in fuel processing and fuel fabrication have urged the Commission to extend indemnity to their operation. Insurers have voiced their concern to the Commission that such an extension might result in the establishment of similarly low levels of financial protection in this area thereby disrupting an already existing insurance market.

The Commission has also decided not to require the contractors it has elected to indemnify against the nuclear hazard, to furnish underlying financial protection even though permitted to do so under 170 (d) of the Price-Anderson Act. The granting of first dollar indemnity to such contractors has been a particular target of criticism by insurers as an invasion of an area where private insurance is able to perform.

(2) UNIFORM NUCLEAR FACILITIES LIABILITY ACT. The Commissioners on Uniform Laws have had under consideration a model act to impose legal liability without proof of fault upon the operator of a nuclear facility for injury to persons and property arising out of a nuclear incident at the facility or in the course of transportation of source, special nuclear or by-products material to or from the facility (various terms are defined in the Act). The Commissioners' Drafting Committee has under consideration its officially designated Sixth Draft of this model act.

(3) LIABILITY FROM UNDERGROUND DETONATIONS OF NUCLEAR EXPLOSIVES. A measure which has caused considerable interest is S. 1144 by Senator Anderson, which would make the Commission liable for bodily injury or property damage occurring in the course of conduct of any activity involving the deliberate underground detonation of a nuclear explosive device. Here again, if the bill becomes law, the liability of contractors would be absorbed by the government in lieu of private insurance.

(4) RADIATION WORKERS COMPENSATION ACT. Congress has under consideration a bill, H R 1267, and an identical bill introduced by Senator Price in the Senate, to make compensable any mental or physical harm to an employee arising out of exposure in his employment to radioactive material, which latter term is broadly defined. The act is not limited by its terms to those engaged in interstate commerce. Definitions of employer and radioactive material seem so broad as to sweep within the act workers using x-ray equipment in doctors' offices and in hospitals. Injury is presumed for any ordinary disease of life which can be induced by radiation exposure if such disease is certified by the U.S. Department of Health, Education and Welfare. Conflicts of jurisdiction between the proposed federal act and any state workmen's compensation act that affords a remedy for such injuries are likely to arise. Amend-

ments to these bills may avoid some of these problems.

(5) NUCLEAR ENERGY LIABILITY CONVENTION. Representatives of the United States Government and fifty-odd foreign governments have been working on an international convention to define liability for injury and damage to third parties arising out of nuclear incidents caused by nuclear-powered vessels (including warships). It is expected that this convention will reach its final stage later in the year. At present it is reported that liability would be imposed regardless of fault up to $100,000,000 from a nuclear incident and that ship operators would be required to insure up to an amount determined by the Government licensing the vessel and that Government would be required to provide indemnification in excess of this insurance.

Respectfully submitted, James P. Allen, Jr., *Chairman*, Richard C. Wagner, *Vice Chairman*, Hamlet J. Barry, Jr., Walter P. Gewin, Phillips L. Goldsborough, III, George M. Jones, Ambrose B. Kelly, John E. Linster, L. Duncan Lloyd, Clarence I. Lord, Edward A. McDermott, Thomas W. Wassell, J. Olin White.

PROCEEDINGS

34th Annual Convention International Association Of Insurance Counsel

QUEEN ELIZABETH HOTEL
MONTREAL, QUEBEC, CANADA
GENERAL SESSION
JULY 4, 1961

THE GENERAL Session of the Thirty-Fourth Annual Convention of the International Association of Insurance Counsel convened at 9:00 o'clock a.m. at the Queen Elizabeth Hotel, Montreal, Quebec, Canada, President Denman Moody, presiding.

PRESIDENT MOODY: Will the meeting please come to order. With this gavel that you gave me last year I now convene the Thirty-Fourth Annual Convention of the International Association of Insurance Counsel. It is now convened and in session.

According to our time honored custom we will begin our meeting with prayer. Let us seek divine guidance for our deliberations here in Montreal. If you will please rise, I will ask Doctor Malcolm A. Campbell, Dean, Presbyterian Ministers of the District of Montreal, to give our invocation. Dr. Campbell.

DEAN MALCOLM A. CAMPBELL: Let us pray.

Our Father, we thank Thee that we can always go to Thee. Thou art never far away. We wander and go astray. Thou doest never go astray. We thank Thee for this occasion, for these men and women who have come from distant parts to convene together, and to plan for the things in which they are interested.

Oh God, we thank Thee for life, for its opportunities, for any part that we have in it. Help us to remember that we are all Thy children. And may this convention be carried on with each individual conscious of the fact that he is Thy child, that none of us walk alone, that Thou art with us day in and day out.

We ask Thy blessing this morning upon this meeting, and the meetings that shall follow. And may Thy name be made glorious. We are created in Thine image. We have Thy spirit within us. Guide us! Direct us! Bless us! And unto Thee shall be all the glory, world without end. Amen.

PRESIDENT MOODY: Thank you very much, Dr. Campbell, for being with us this morning and giving our invocation.

In keeping with our custom I will now entertain a motion to dispense with the roll call and reading of the minutes of the last convention. (The motion was made, seconded and carried.)

It is now my pleasure to call upon a distinguished member of the Canadian Bar Association, a well known member of our Association also, to introduce the speaker, who will extend to us the Address of Welcome to our convention. I now recognize Jean DeGrandpre, who will introduce our next speaker.

MR. JEAN DEGRANDPRE: Mr. President, ladies and gentlemen. An outstanding jurist, a sound practitioner, a gentleman whose friendship is both warm and sincere; very seldom does one find such a concentration of qualities in the same individual. The Chief Justice of this province, the Honorable Lucien Tremblay, is the exception that confirms the rule. He carries them all to the highest degree. His recent appointment as head of the judiciary in the province was received with unparalleled praise in all quarters. A graduate of the University of Montreal, our Chief Justice subsequently earned a degree of Doctor in Civil Laws for his book on "The Capacity of Married Women in the Province of Quebec". He developed an extensive general practice. He was one of the few Canadian experts

on constitutional matters. He represented the province on several occasions before the Supreme Court of Canada and Royal Commissions. This keenest mind is crowned by a heart of gold. To those who are close to him he always succeeds in making their association pleasant and rewarding. It is with charm that he meets you, and with understanding that he takes part in a discussion. We are convinced that he will dispense justice with an open mind, always ready to listen to new theories, but equally alert to discern the sophism from the truth. Ladies and gentlemen, Chief Justice Tremblay!

Address Of Welcome

THE HONORABLE LUCIEN TREMBLAY
Montreal, Quebec, Canada

I SAID a few words in French because I thought that you would blame me if I did not. The second largest French-speaking city in the world is delighted and honored to have you as its guests. I hope that the very important work that you have to do will not entirely prevent you from enjoying your stay among us, and from availing yourself of the hospitality of the French-speaking Canadians. It has been said that Montreal is an open city; if open is used in the bad sense of the word, it is untrue. If open is used in the sense that you are most heartily welcome in Montreal it is true. Let us say that Montreal is a city very much alive. And you will undoubtedly find that out if you have a chance to go around a little bit.

I hope that you will forgive me if I say a few words about law. I am afraid that it is the only subject on which I can speak with a minimum of knowledge. But I want you to understand very clearly that I am now speaking only for myself, and not for the court that I preside over, nor for any other Court.

For some years now there has been in our Canadian courts a very marked tendency towards extending the notion of negligence, the notion of fault. It is very easy for a judge, who is quietly seated in his room and who may take hours working on a case, to find out something that a man should have done and did not do, or something that a man should not have done and did do, in the very few seconds that elapsed between the time when the danger appeared and the time when the accident happened. It is also very easy to say, after an accident happened, that it would not have happened if a precaution had been taken. But the question is how many people would have even thought of taking such precaution before the accident? If the present trend of the jurisprudence is allowed to continue, I venture to say that the day is not very far away when we shall have automatic liability, that is when the mere fact of causing a damage will entail liability, whether there is negligence or not, whether there is fault or not.

I understand that you are on the defense side, and you can do much to remedy the situation. But I shall not annoy you any longer. You have very interesting and very important work to do. You may also have very pleasant things to do, if I leave you the time to do them.

Again I wish you the greatest success in your work, and a most pleasant stay in Montreal.

PRESIDENT MOODY: Thank you Judge Tremblay. I believe you are a judge after my own heart. I would like to take you back to Texas with us.

With such hospitality and warmth towards your neighbors from the South, I am certain we will have a rich and rewarding time here.

I will now call on one of our members to give, on behalf of the Association, a response to this fine welcome. I am going to call on a man from West Texas—from Midland, Texas—who, I am certain, understands every word of French that the judge said. I will call on our own Tom Sealy.

Response To Address Of Welcome

TOM SEALY
Midland, Texas

CHIEF Justice Tremblay, President Moody, Ladies and Gentlemen of the Convention:

Not long ago a Canadian friend of mine was visiting me, and I drove him out to see some of our country in and around Midland, Texas, where I reside. This country is flat, sparse in vegetation, and has a good deal of sand, so that it is a semi-desert country. As we drove along, a bird—which we commonly call a road-runner for the reason that it mostly runs instead of flies—ran across the road. My Canadian friend asked me what kind of bird it was. I told him it was a chaparral, commonly called a road runner, but that in reality it was a member of the bird of paradise species. We rode along a while longer, gazing at the landscape, and finally my friend asked again what species that bird was a member of. I told him it was a bird of paradise, and he said, "All I have to say is that he is a long way from home."

We too are a long way from home, but your mountains, lush valleys, great St. Lawrence River, this entrancing city, steeped with centuries of tradition, and the friendly welcome you and your people have extended us all combine to make us feel that we are simply visiting *a next door neighbor.*

Unlike some countries, which permit very little intercourse between themselves and their satellites with other nations, the Dominion of Canada and the United States subscribe to the doctrine of comity of nations, under the provisions of which one nation as a courtesy to the other recognizes the laws of the other nation in its own jurisdiction for certain purposes, and historically we have been not only good neighbors but close friends. As a matter of fact, our countries are so friendly that one year your currency is favored over ours on the rate of exchange, and the next ours is favored over yours! Two years ago when our Association met in Banff your currency was favored, so that it took one dollar and a nickel of our money to buy one dollar of Canadian funds. This year you have reciprocated, and the situation is somewhat reversed, so that some 97% of our dollar will buy a full dollar of your money. We are most grateful for this friendly act on your part, but we are sure it will pay off for Canada because our Yankee thrift will assert itself. The ladies will buy the silverware, china, and linen for which your country is famous, and the ratio of your exports to imports will rise tremendously!

We are proud of this friendship and of the fact that the border between our two countries is the longest unfortified boundary in the world. We are certain this relationship will continue because of our friendship for you and yours for us. We also know that should you ever be tempted to take us over one look at our national debt will convince you we will not be worth it!

We are proud too of our International Association of Insurance Counsel. Our Association is truly an international one, and your countrymen comprise an important segment of it.

This Association, as you may surmise from its name, is composed of attorneys whose practice is devoted in a substantial way to insurance law and litigation. This means that most of us represent casualty and life insurance companies and more especially are involved in the defense of claims for damages asserted against those persons who are insured by the companies we represent and who hold their policies. While some of this litigation necessarily arises from a bona fide dispute between the parties, some of it is occasioned by unscrupulous people who seek to recover unjustly on the theory that the person sued is adequately covered by insurance. In defending these suits, accordingly, we are not only representing the companies concerned but all of the people involved with the hope and expectation that we can hold down the cost of insurance so necessary to the safety and well being of all of our people.

We hold our annual conventions for the purpose of exchanging information and knowledge for the mutual benefit not only of ourselves and the companies we represent but for the people at large. We hope too, Mr. Chief Justice, that ultimately some

of this knowledge and information may be of benefit to the judiciary!

We know that in these surroundings our sessions will be fruitful. We are grateful for your hospitality and are glad we came to your beautiful city.

PRESIDENT MOODY: Thank you, Tom, very much, for your fine response. I didn't know exactly how eloquent Tom was, or I wouldn't have had any trouble selecting a speaker. I heard Red Betts say at one of the conventions that, as he was looking around the room, he liked to see these empty seats up front; he said it made it look like a church and gives us some prestige. But I suggest that those of you in the back when you get tired standing up, why come on down here and I'll guarantee you we won't take up a collection.

Now we move on as rapidly as possible to a very interesting part of our program and that is the introduction of our new members. To make this introduction, you will see from your program that I had selected our good friend and past president, Arthur Blanchet. However, Arthur, as some of you know, became ill last evening and his doctor wanted him to come back to New York City, so that he could be examined and whatnot. He went on back last night and it was his wish, however, that Tiny Gooch take his place in making this presentation of fine new members. Tiny, will you come forward and be good enough to make this presentation for us. (Mr. Gooch presented the past presidents and the new members of the Association).

MR. GOOCH: Ladies and gentlemen, it is my pleasure, on behalf of the Executive Committee and the President, to present and to commend to you these fine new members of this organization. We hope you will come often and partake of these conventions, and I am sure you will get the good from them that we have. Thank you.

PRESIDENT MOODY: To the new members of our organization I also say, "Welcome to you". All of us here are your friends, just for the asking. Don't stand on formality or ceremony. Make the rounds with your fellow lawyers whom you find here and get acquainted. Remember that it is said that anyone is an expert who is twenty-five miles from home. You are all qualified, so shed your timidity and let the other older members know all about you.

Now, in talking to the older members I don't counsel you to necessarily be boring. I have heard that a bore is a lawyer who insists on telling you about the case that he has won, instead of listening to the cases you've won. And keep in mind that, after all is said and done, an awful lot is more said than done. So, guide yourselves accordingly and attract attention to yourselves a little bit so we will all know you.

Now, Article X of our by-laws, states that the President shall deliver an address. Nothing is said about what the address is, what it shall be about, or any such thing. The door is apparently wide open. Some of our presidents have made very scholarly lectures on legal problems, others have told jokes, and others have practically foregone making any address at all. I feel that the few words I should say should have a pretty close relation to what I feel that you all want to hear. And I believe that your interest is very close to the International Association of Insurance Counsel and all of its activities. The more a member knows about the Association, the better member he is, and the more he enjoys his Association. I will make a few remarks for the benefit of the new members; and perhaps as a reminder or refreshing the memory of some of the others.

President's Report

DENMAN MOODY
Houston, Texas

Our Association had its beginning in 1920, at a meeting in Atlantic City. The membership at that time was limited to general counsel of health and accident insurance companies. It was not until 1927, in fact, that the general counsel of casualty companies and independent practicing lawyers were allowed to become members of the association. It was 1934 that our first JOURNAL was published. From its inception in 1934 down to the present time we have only had two editors. George W. Yancey was the first editor of the JOURNAL and, believe it or not, he was the editor from 1934 until 1955, a period of 21 years. He relinquished that job at that time—we finally turned him loose—and Bill Knepper took over this job, and he has been the editor ever since.

The JOURNAL is generally looked upon as one of the very finest of legal publications. It will interest you to know that several thousand issues of the JOURNAL go out quarterly; they are sent to over 400 federal judges and over 550 state judges, our own membership, and others who subscribe who are not members. It is a terrific task to get up this JOURNAL. It comprises about 600 pages of articles each year. Bill Knepper over these many years and George Yancey have performed these tasks because of their devotion to this Association and to the JOURNAL. They have never received any type of monetary compensation for this, nor has any officer or member of the Executive Committee, nor any of the officers of this outfit.

Now the International Association of Insurance Counsel has grown steadily. In 1920, as I have stated, it had only eleven members. It had a pretty low beginning, I guess you would say. By 1930 the membership had risen to approximately 600. In 1961 there are 1,821 members. A total of 122 insurance companies have general counsel, or home office counsel as members of this organization. In the last few years the membership of this Association has increased only slightly. While we have no rule that places a maximum on our membership, we have never been engaged in a membership drive. I feel personally that the membership of our group will probably increase about ten or fifteen percent more, and then I believe that it will level off. In a group this size you have a great many retirements, job changes, appointments to state and federal benches, and by this type of activity many members are removed from our ranks every year.

Your Executive Committee is swamped and bombarded at this time with applications for new memberships. It is doing an excellent job, I feel, of screening these applications. And you may certainly be assured that the members who are taken in will meet, in every particular, the high standard of membership.

Now to pass for a moment to another question. One hundred fifty-eight of our members are Home Office Counsel. As I stated this represents 122 insurance companies. The American Bar Association has recently referred to its Professional Ethics Committee and to its Unauthorized Practice of Law Committee this question: "Do liability insurance companies engage in the corporate practice of law by the use of salaried counsel to defend suits against their insured?" This question is presently pending before these committees of the American Bar Association.

At our Mid-Winter Meeting this year, which was only a few months ago, our home office counsel members petitioned the Executive Committee to make a study of this problem within our own organization and to reach a conclusion on the question of law presented. Now, it would have been far easier for us to have waved aside this very controversial issue, said we had no time for it, or made some disposition like that. But your Executive Committee decided to meet it, in what I think is the proper manner, and that is meet the question head-on. I appointed a committee to study this matter. The committee was composed of: Taylor Cox, from Memphis, who is the chairman, Arthur Blanchet, Charles Pledger, Cameron Buchanan, Harley McNeal and Doug Stripp. Payne Karr, your President-Elect and I also attended a two-day meeting.

This committee read all the law it could find, and all the briefs that were before the committees of the American Bar Association that I have mentioned. And then it made its report yesterday to the Executive Committee. At its meeting yesterday, the Executive Committee further studied and deliberated over this important and very controversial subject, and it took the following action, and I will read it:

WHEREAS, a Resolution of the Lawyers' Club of San Francisco, pending before the Standing Committees on Professional Ethics and Unauthorized Practice of Law of the American Bar Association, poses the question whether liability insurance companies are engaged in the corporate practice of law by the use of salaried counsel to defend suits against their insureds; and

WHEREAS, a Special Committee of the International Association of Insurance Counsel and the Executive Committee of said Association have made careful studies of that question, including a review of the briefs submitted to the American Bar Association committees:

NOW, THEREFORE, BE IT RESOLVED by the Executive Committee of the International Association of Insurance Counsel:

1. No unauthorized practice of the law is involved in the use by insurance companies of salaried counsel to defend suits against their insureds;

2. The clear authority of the insurer to select such counsel as it may choose and to defend such suits is derived from the direct financial interest which the insurer has in the claims asserted, together with the obligation to defend which is set forth in the policy contract.

Now that was the action taken by the Executive Committee. Of course, this matter coming up as it did rather suddenly before this meeting, our general membership has not yet had an opportunity to make any study of this matter, or to consider it and talk about it, and to read the briefs that have been filed, and to take whatever further action you want in the matter. During the coming months all of our members shall receive the necessary data which will allow them to properly consider this question. It is our plan—at least it will be Payne Karr's plan—at the next annual meeting to submit to the membership for its approval or disapproval this action of the Executive Committee. The present report is merely to advise you of the feeling on the matter of the Executive Committee and your special committee, who I have stated have gone into this matter very thoroughly and have come to the conclusion that I have mentioned. And that will be taken up at the next meeting.

Now you know that the Executive Committee and officers have been meeting here in Montreal since last Saturday, July 1. It has been a long time, we have been sitting all day. I think I have been out of the hotel twice since I have been here, and that is true of the other members, except those who go out late at night and, of course, I don't know anything about that. I spoke to one member this morning. He told me he had already been here at Montreal for four days, he had eaten too much, he has used up all his supply of aspirin and Alka Seltzer, was almost broke and the convention had only started today! I will not divulge his identity. Another member who had been here for four or five days and apparently fared a little better than the other one, he asked me if I had tried any of these Canadian drinks. I assured him that I did not partake of beverages of that type and he then said that he thought they were wonderful, and I asked him why. He said, "Well, these Canadian drinks are so marvelous", he said it made him see double, but feel single!

You know the practice of law is filled with all sorts of surprises. I am not going to tell you about a case, but I had a client that asked me to see his sister—she was a married sister—and she was having trouble with her husband. And I told him that free legal advice was worth just what you pay for it, but nevertheless he wanted me to see her. So I said I would. So she came up and I talked to her about her troubles, and her husband. And her chief trouble was, which, of course, is not common to all women, that he wouldn't give her enough money. So I asked her what he did with his money. She said he made a fine salary but never seemed to have any money, and I said, "Well, does he gamble?"

She said, "No, he doesn't gamble."

"Well, does he go to horseraces or do anything like that?"

She said, "No, not at all".

So I didn't know quite how to get around to the final question, so as discreetly as I thought I could I said, "Do you suppose that there is any likelihood that he is spending this money on some other woman?"

And she said, "Oh no, Mr. Moody, it couldn't possibly be that; you know he's reaching forty-nine". I didn't discuss my age.

Now, I wish to say this to you in my address. I have been here several days and I think I have gotten the feel of the convention. I think I have the feel in a way of the home office counsel that I have talked to. And I think I can say that the spirit of the International Association of Insurance Counsel has never been higher. . . the enthusiasm of our members, I feel, is spontaneous. Our program is a hard-hitting one, the understanding and co-operation between independent counsel and home office counsel has never been on a higher level. Through our inspired committees we are dedicated to take the initiative and carry the fight for the defense. Thank you.

We shall now receive the report of our very able and efficient Secretary-Treasurer, George McD. Schlotthauer, of Madison, Wisconsin.

Report Of The Secretary-Treasurer

GEORGE MCD. SCHLOTTHAUER
Madison, Wisconsin

A YEAR ago our membership stood at 1,789. During the year there were 26 resignations, 24 deaths, 4 delinquents. We took in 123 new members. The number of members as of today stands at 1,858. In the past year there were 134 applications for membership filed, of which 123 were approved, 10 rejected and one is held. At present, as the President has told you, there are a great number of applications being processed and considered and it is a tremendous job to carefully screen them. There are 80 in the process of being screened at this time. Five resignations were because of appointments to the bench.

Now, I give you my report as Treasurer. As of a year ago the balance sheet stood at $71,978.50, today our balance is $75,290.59, and that is made up as follows:

We have cash in the checking account of	$31,746.98
Our savings accounts	23,543.61
We have in U. S. Savings	15,000.00
That makes a total of	$75,290.59

Our expenditures during the year were:

Executive Secretary's office	$10,229.00
(I am going to leave off cents to save time here) (Last year the expense was $7,838.00. The additional cost was brought about by moving the office to a place where Blanche could get a look at the outside world. The office before was one of those inside offices and she likes to look outside and watch the aeroplanes.)	
The JOURNAL publication this year was	22,750.00
(Last year the expense was $29,000—the difference roughly occasioned on account of the publication of the General Index.)	
Admission fees refunded	275.00
Mid-Winter Meeting expense	6,800.00
1961 Convention expense—to date	365.00
Auditing expense	275.00
President's office expense	220.00
Secretary-Treasurer	77.70
(last year it was $73.20—I will have to look for that difference.)	
Miscellaneous	2,277.00
Our total expenditures this year to date	$43,272.00
(Whereas last year for this same period our expenditures were $48,947.00)	

The receipts this year are as follows:

Dues	$44,100.00
(Whereas last year the dues were $42,000.00)	
The JOURNAL brought us, this year	4,920.00

(Whereas last year it brought us $4,400.00)	
Admission fees this year were	3,300.00
(Whereas last year they were $2,300.00)	
DRI refunds amounted to	893.00
Convention registration fees this year	12,750.00
(Where as last year it was $8,000.00)	
Interest	549.00
Miscellaneous income	11.93
That made a total income of	$66,524.00
The excess of receipts over disbursements this year was	$23,252.00
(Whereas last year it was only $9,395.00).	

I am pleased to tell you that last year this Association made available to DRI the sum of $15,000.00 of which $5,000.00 was advanced as a loan. As of yesterday that $5,000.00 has been repaid by DRI to IAIC.

In the past we have had surplus funds invested in savings banks at interest of three percent. At our Mid-Winter Meeting in Florida, by authorization of the Executive Committee, that money has now been deposited in federally insured savings and loan associations, with interest at four and one-half percent paid quarterly.

This report would not be complete if I didn't express my appreciation for the good work of Blanche Dahinden. Without her this job would really be almost impossible. If Blanche is here in the room . . . would you please stand up and be recognized? Blanche, we are applauding for you anyway, Blanche.

We all appreciate Blanche's great devotion to her office.

Mr. President, in my opinion the financial affairs of this Association are on a sound basis. I appreciate the confidence that you have reposed in me. Thank you.

PRESIDENT MOODY: George, your report is a fine one and is accepted. Thank you very much.

Next on our program is the Report of the Editor of the JOURNAL. This man continues to perform what I say is nothing less than an herculean task on our behalf in working on the various publications, including the JOURNAL. We owe him a tremendous vote of thanks. Without more ado, I present to you Bill Knepper.

Report Of The Editor

WILLIAM E. KNEPPER
Columbus, Ohio

DURING the past six years when I have have been privileged to serve as your Editor, the Journal Committee, under the chairmanship of Gordon H. Snow, of Los Angeles, has developed a fine editorial staff. We now have eight regional editors and fifty-two state editors. With splendid help from the standing committees of the association, these editors obtain the articles that make our JOURNAL outstanding. They also supply much of the material that is published in the newsletter, For the Defense.

R. Harvey Chappell, of Richmond, Virginia, continues his excellent job of editing our department of Current Decisions. Associate Dean Robert J. Nordstrom, of Ohio State University's College of Law, is rendering a most valuable service in Reviewing the Law Reviews. This year, Harley J. McNeal, of Cleveland, a member of the Executive Committee, has assumed responsibility for our department, Of Law and Medicine, and has obtained some exceptionally fine papers. And then we are particularly happy in the recent appointment of Professor Robert W. Miller, of Syracuse University College of Law, as Managing Editor of the JOURNAL. He has previously functioned as Managing Editor of For the Defense. In his new capacity Professor Miller has taken charge of all of the editorial work of the JOURNAL except for administrative matters and policy decisions.

In addition to publishing the JOURNAL and editing the newsletter, your editorial staff has worked with The Defense Research Institute, Inc., in the preparation of two

monographs: The Revolt Against "Whiplash", and Products Liability. Their reception by the defense bar has been enthusiastic. Several more monographs are now being written and will be distributed by DRI in the near future.

In the final analysis, however, you are the people who deserve the credit for the success of these publications. The articles that you write and the reports of decisions that you send to us are what make the JOURNAL, the newsletter and the monographs so very valuable to bench, bar, law schools and the industry. Please keep up your good work.

And now, Mr. President, following the custom established by our Editor Emeritus, George W. Yancey, it is a pleasure to present to you a complete set of bound volumes of the Journal. All but the last volume have been shipped to your office. This one I now hand to you in token of our grateful appreciation of your faithful service to this association.

PRESIDENT MOODY: Bill, I certainly thank you for the fine report, and I certainly appreciate my bound set of the JOURNAL. I had probably done—like a great many have done—I had received my journals, I would read the index, maybe read it, and then I would look up and that issue would have disappeared somewhere. I am glad to have this complete bound set. I shall certainly treasure it and it is already in my library, and I expect to use it for the rest of my life.

Mr. Baylor, I wish you would come forward please and give us at this time the Report of the Memorial Committee. Mr. F. B. Baylor.

Report Of The Memorial Committee—1961

F. B. BAYLOR, *Chairman*
Lincoln, Nebraska

THIS is the anniversary of a declaration from which came the breath of life to a new nation. We now meet on the hospitable soil of another nation equally dedicated to the creation and preservation of the liberty that declaration proclaimed. The members of this association are proud of the friendship which exists between our two countries and are devoted to that common ideology from which it springs.

On the latest page which an inexorable hand has turned are the names of those whose adherence to the ideology of personal liberty is reflected in their devotion to their families, to their communities, and to their profession. They not only accepted but welcomed the challenge brought to them by that which was difficult and so doing became Mountain Men. Of them it has been said:

Great men live on Mental Mountains.
Their spirits tower above the storms;
Their minds are above doubt, cynicism and despair;
Their horizons are expanded; their mental frontiers are broad;
Their visions are lifted above the fog of petty things;
They look out over the obstacles into the Promised Land of Tomorrow;
They see the rainbows while little men battle with phantom shadows in the valley;
They see the sun in the east while the valley-dwellers burn their tiny lamps in darkness;
Their heads are in the clouds but their feet are bedded in the solid rock of Fact and Reason;
They dare the sky; they take the risks;
Like the Alpine Guide, they would have as their epitaph: "He died climbing."

On the turning page we see these honored names—names of men who died while climbing:

William L. Clark, Birmingham, Alabama
Gurney G. Cox, Tulsa, Oklahoma
Ray E. Cummins, St. Paul, Minnesota
Lindsey M. Davis, Nashville, Tennessee
Ray S. Dempsey, Oshkosh, Wisconsin
William H. Freeman, Minneapolis, Minnesota

A. Bruce Keller, Pittsburg, Kansas
Oliver K. King, White Plains, New York
Raymer F. Maguire, Orlando, Florida
Richard C. Masters, Lansing, Michigan
John J. Nangle, St. Louis, Missouri
Herbert H. Naujoks, Chicago, Illinois
Frank J. Ryan, Utica, New York
Lewis C. Ryan, Syracuse, New York
Herbert M. Sherwood, Providence, Rhode Island
C. B. Snow, Jackson, Mississippi
Don W. Stewart, Lincoln, Nebraska
Lowell W. Taylor, Memphis, Tennessee
Raymond A. Tolbert, Oklahoma City, Oklahoma
Mark Townsend, Jersey City, New Jersey
Thomas M. Van Cleave, Kansas City, Kansas
William M. Walker, Rock Island, Illinois

And to those who bore those names we pledge that the ideology which they espoused we will not abandon; that the example of loyalty which they set we will not forsake; and that the prized relationship which they created we will not cease to cherish.

Let us stand and in doing so ratify and confirm the following resolution:

BE IT RESOLVED: That humbly and sorrowfully we accept the Final Judgment and in sadness deplore the loss which has come to all who have enjoyed the fruitful and irreplaceable relationships now transformed to unending memory.

BE IT FURTHER RESOLVED: That looking now upon and guided and inspired by the lives which are ended each of us in meditation gives effect to the words of Howard Arnold Walter:

I would be true, for there are those who trust me:
I would be pure, for there are those who care:
I would be strong, for there is much to suffer:
I would be brave, for there is much to dare.
I would be friend to all—the foe,—the friendless:
I would be giving, and forget the gift:
I would be humble, for I know my weakness:
I would look up—and laugh—and love—and lift!

Mr. President, in solemn convocation we have given expression to the esteem in which we hold those who, though their voices be stilled, will continue to live in our memory. In silent meditation we have reasserted the sorrow which their departure has brought and have reaffirmed our own dedication to the principles which they espoused.

The names here presented now are committed to this association for indelible inscription on its memorial role.

The Memorial Committee respectfully submits its report. F. B. Baylor, *Chairman*, L. Duncan Lloyd, *Vice-Chairman*, Pat H. Eager, Jr., Gerald P. Hayes, Joseph A. Spray, George W. Yancey.

PRESIDENT MOODY: Mr. Baylor, on behalf of the International Association of Insurance Counsel, the report of your committee is accepted and filed. We are deeply grateful to you for making this report. A copy of your report will be sent to the immediate families of all of our departed members.

Now the main address at the opening session of our meeting will be made by a man who is generally regarded in the United States as the leading specialist in construction industry trends, and in general business conditions. I now call upon Earnest W. Fields, of New York, to introduce our speaker.

MR. EARNEST W. FIELDS: It is my privilege and my pleasure to introduce to you today our speaker, Doctor George Cline Smith, vice-president, chief economist, and a member of the board of directors of the F. W. Dodge Corporation, one of the associates of the McGraw-Hill companies. As our President has just said, Dr. Smith is regarded as the outstanding specialist in construction trends and general business conditions. Prior to his coming with F. W. Dodge, he spent six years with the United States Department of Commerce, as their chief economist. manager of the finance department and in charge of their national tax policy. You see what has resulted from that. He is today President of the National Association of Business Economists; he was born in Maryland; he holds an A.B. and a Master's and a Doctor's degree from Washington University in St. Louis. During World War II he was a naval intelligence officer serving in the South Pacific. He is a fine gentleman, a learned man in his profession, and I consider it a distinct honor to be able to present to you, Dr. Smith!

The Business Outlook

DR. GEORGE CLINE SMITH
New York, New York

THIS Association is to be complimented because it has done one thing that has never been done before; something that was almost impossible of accomplishment and it has happened. For the first time in my life I am working on the 4th of July. I did think somebody ought to call attention to the fact that this is the 4th of July. . . . I guess it has been called. My temptation was to find a good rip-snorting 4th of July speech and make it to you, but I find that they don't hardly make those things anymore; there are none lying around in any of the speech books that I can find.

Now, it is a pleasure to be here in spite of it being the 4th of July. It is also a pleasure to see a group of intelligent-looking people who will sit still and listen to an economist. I am not sure that I would always do that. . . even a successful economist like myself! I think I have to correct one thing there that Mr. Fields said in his introduction. It is the United States *Chamber* of Commerce, not the *Department* of Commerce. I am saying that not to be critical, but I do want to keep the record straight there. There is a difference you know; one is government and the other is against the government.

As a matter of fact, I was not only in charge of its work on tax policy, I was in charge of its government expenditures program aimed at reducing federal spending. During my ten years of office, federal spending went up by seven billion dollars a year. I was the most frustrated man in Washington.

Seriously, though, this business of economics is more important than you might suspect, and economists are probably more important than ever occurred to you. I can see a few signs of skepticism here and there in the audience and I think perhaps I had better illustrate what I mean. I have to go back to World War II to do that. We had, back in Washington in those days, a doctor, he was about 75 years old, he was not an ambulance chaser, but a perfectly respectable old gentleman, and he had been retired for some years. And all of a sudden he found that all of the younger doctors had

been called into service in the army or navy, and he felt his patriotic duty was to go back into active practice.

Well, it was pretty hard on the old man because there was so much business to be done, there were so few doctors around. One night around eleven o'clock he found that he still had about twenty patients to call on. He just couldn't face it, so he popped into one of those taverns that they have on practically every street corner in Washington—the highest liquor consumption per capita in the world, there—and I guess for good reason. . . . stopped in at one of these taverns and had himself a nightcap. In the course of the nightcap, he struck up a conversation with a very pleasant young man who was standing down the bar from him. The young man turned out to be one of those 30,000 lawyers that the OPA had gotten to set prices. The two of them had a discussion and, over a few more nightcaps, the way these things go, the discussion turned into a debate, and the debate turned into an argument and it revolved around one central theme and that was: which of these two professions, medicine or law, was the oldest and the most honorable? Well, they kicked it around, up, down and sideways, and they were getting absolutely nowhere until finally the doctor thought of a clincher. He drew himself up to his full height, he shook his finger in the young lawyer's nose and he said, "Young man, do you realize that when God created Eve out of Adam's rib he performed the first surgical operation—and that proves that medicine is the oldest and most honorable profession."

Well, the young lawyer just hooted and howled at that and he said, "Why Doc, long before that law and order were brought out of chaos, and there must have been a lawyer around somewhere." Well, about two paces down the bar was an economist and he

looked up from his beer—which was all he could afford—and said, "Who do you think created the chaos?"

Now this, precisely, is why I am here, I assure you. Part of the job of an economist is forecasting. This is the most risky, the most hazardous, the most dangerous part of the job. Also the trickiest. I think I might explain to you a little bit about how we do our forecasting. I may get booted out of the "economists' union" for this, but we are a little like the magicians' union that way—we try to keep these things sacred—but I do think that you are entitled to know just a little bit about how we do this, so I will pull the curtain aside for a moment.

Again I have to go back to a parable. It goes back to Canada, the same month, November 1942, but up here in the western part of Canada, you may recall that the Alcan Highway was being built to Alaska, and the United States Army was doing some of the work. During the course of this, the commanding general got to wondering about the problems he faced in the winter. And so, one day in November, he called his chief weather man in, his chief meteorologist, and he said; "Chief, I want to know what kind of a winter we are going to have."

Well the meteorologist said, "General I'm sorry, we are doing pretty well if we can tell you what it is going to be like tomorrow, but we don't make long range forecasts for the whole winter."

The General said, "That's a lot of nonsense. You've got ten men on your staff here, thousands of dollars worth of equipment, millions of dollars worth back in Washington, and you can't tell me what any old Indian around here knows?"

And the weather man said, "No, I'm sorry."

And the General said, "Well, look, these Indians are forecasting a hard winter." And he said, "You'd better get out and talk to some of these Indians and find out how they do it."

The weather man thought this was nonsense, but an order was an order, and he found an old chief who had a pretty good reputation for weather forecasting, and he rapped on the chief's teepee and the chief let him in.

And he said, "Chief, I understand you think it is going to be a hard winter."

And the Chief said, "Ugg, much snow, much cold weather."

And the weather man said, "Well, Chief, I am more interested in how you do this forecast." And said the weather man, "Do you study the woolly bear, the caterpillar?"

"Ugg—woolly bear, the caterpillar, him no good."

"Do you watch the flocks of geese as they migrate south?"

"Ugg, geese him no good."

"Well, Chief, what do you use?"

"Ahh, me have heap good sign. Me see army chop him heap firewood."

Now, this is more or less how we do it.

I was brought up here to be serious and I guess we have to get serious a little bit. I am not going to talk about the construction outlook, if any of you people are worried about that, but some things about business . . . . what is going on. And a few other things that may get me in trouble; if not here, at least down in Washington. I have the habit of doing that. I will apologize to any Canadians in the audience; I assume there probably are some. But things down in our own country are confused enough, without trying to understand what is going on up here in Canada; and I think Canada may, at this point, with its new budget, and with its fight over Mr. Coyne, I think Canada may be even more confused than we are, and that is saying one heck of a lot. So I will not talk about Canada because I am not competent to talk about Canada. And for that I apologize.

We have just lived through what may go down in history as the reluctant recession of 1961; I call it a reluctant recession because it was very peculiar, very paradoxical. I would say it was the most prosperous recession that we have ever had in our country. It bothered some people, especially during the campaign season last year in the fall; it bothered some people partly because it came in pretty quickly after the recession of 1958. We had a much shorter time period in between recessions this time, than we have had before. Some people are drawing conclusions from that, that this may indicate some future trends that are none too good. However, I think it is probably not true.

I think the real cause of the reluctant recession of 1961 was probably the steel strike of late 1959. I said at the time, and I will say it again, that there are a lot of business men who confuse the laws of physics with the laws of economics. They assumed that when you had a steel strike which knocked the production curve—it just went down like this—they assumed that this would be followed by an equal and opposite reaction

and when the strike was over that the production curve would go up like that; so that you would have this kind of a pattern (indicated by arm movement "down and then up").

Well, the fact is that economics is not physics; that you don't knock five months out of the production of a basic industry like steel and use that as the basis for a boom. Any fool ought to have been able to see that. . . I did. And, anyhow, the fact is that we did have this steel strike; it did knock out our basic industry and it affected a lot of other industries.

All of a sudden the strike was over. Everybody, if you go back and read the Kiplinger letter and all the other letters, everybody was saying, "Oh boy, we are going to have this great boom when the strike is over."

The big danger was that businessmen would be disappointed when they found out there was no boom. And, sure enough, that is exactly what happened. There was wide-spread disappointment and, incidentally, I've got to tell you a little more about how we do our forecasting at this point.

Senator Flanders was campaigning around Vermont not so many years ago—I've forgotten just when—and he drove into a little village—he had an entourage of two or three cars—drove into a little village—and as he was coming into the village he noticed that everywhere he looked there were bulls-eyes painted on the sides of barns and telephone poles. . . all over the place. And in every bulls-eye right smack in the middle was a bullet-hole; it never deviated by a hair, in the center of the bulls-eye.

He asked one of the local men who this remarkable marksman was; and the native said, "Oh he's just one of the fellows we've got around here."

And the senator said, "Well, you know, I would like to meet him."

And the native said, "Well, Senator, I don't think you really would."

And the senator said, "Why not? Anybody that is as good a shot as that I would like to meet."

And the native said, "Well, Senator, to tell you the truth he is the village idiot."

"I don't care", said the senator, "I would still like to meet him."

So they brought the village idiot up to the senator and the senator explained to him that this was the most remarkable show of marksmanship he had ever seen in his life. . . how did he do it? "Oh Senator", said the idiot, "it is real easy. I shoot first and I draw the bulls-eyes afterwards."

Now there is, believe me, more that a little of that; that is why I had to tell that story, so I can say to you that I predicted what would happen in the steel strike back in November; I predicted that businessmen would be disappointed. I am drawing this bulls-eye now—afterwards—because I am wrong more often than I am right, believe me.

But businessmen were disappointed at the failure of the recovery and so what did they do? They began cutting back on their inventories, they began cutting back on their plant and equipment-spending plans, and all of a sudden we were in the midst of what can best be called a businessman's recession. It was brought on by business management, we, ourselves, cutting back out of, I think, sheer disappointment over the failure of that boom of 1960, to materialize.

Meanwhile there were some real paradoxes in this recession. For one thing, the consumer behaved nobly; he went right on spending money as if he had it. He didn't know anything about any recession, and suddenly it occurred to a lot of businessmen that they didn't have inventories because customers were coming into the stores and asking for things that weren't in stock; this is quite true. Another paradox in this recession was that employment, not unemployment, the number of people who were working on a seasonly adjusted basis actually set a new all time record in February; at the low point of the recession, on a seasonly adjusted basis we had more people working than ever before in history. What kind of a recession is that?

Now, you do have to beware of seasonly adjusted figures. The president of a steel company that I happen to know up in Cleveland has a new statistician. The president told me he was looking over his reports and he noticed that in January and February of this year there were several thousand tons of iron ore received in Cleveland. He called in his statistician and he said to him, "Look, how could we have gotten any iron ore here in January and in February?"

And the statistician said, "Well sir, these are seasonly adjusted figures."

And the president said, "I don't care; those lakes were frozen solid; there wasn't a boat that moved."

And the statistician said, "Sir, on a seasonly adjusted basis the Great Lakes are never frozen."

Now there are a few more of these paradoxes. This was an odd recession in which prices stayed high; it was an odd recession in which the stock market practically ignored the existence of the recession and went right along booming. Well, so much for that. The recession is now clearly ending. Everybody, even both political parties agree on this fact, that the recession is over. We took a survey of economists last October; we take one every year. . . this is part of this Indian weather man type of operation. We ask these other economists what they think, what they see. Sometimes it is our own opinion coming back to us, but you know you always feel better if you hear it from somebody else, even if you told a friend of his in the first place.

As a matter of fact one unethical economist I know of actually wrote an article and had it published under an assumed name and then quoted it to prove he was right.

Well our economist panel predicted that we would have a mild recession and that by the middle of 1961 all the indicators would be going back up and, sure enough, for the first time in history, the economists were more or less unanimous, and they were pretty much right, which surprised the heck out of most of us.

The real question today is, not whether we will get out of this recession, but how long is the recovery going to go on, and how fast is it going to be? Mild, like that, or is it going to be one of these steep, right-away recessions?

Well, the boys in power down in Washington, who took a really dismal view of the economy when they were running for office in October, are suddenly waxing exuberant about it. They are figuring the gross national product next year—standard forecast—will be about five hundred and sixty billion dollars. It has been running at about five hundred even. This means we would be adding sixty billion dollars a year to our national output in one year's time.

When you consider that it took us from 1607, when they landed at Jamestown, up until this year to get up to five hundred billion, adding another sixty to it in one year is going to take a little doing. It is possible; it actually can happen. I think myself it is a rather high estimate. I suspect that we will be somewhere in the five-fifty range, though, by next year, and this is nothing to complain about.

There are a few reasons for not being wildly enthusiastic about this boom. I am not a chronic pessimist, I am more often accused of being an optimist, and because things do look pretty good, I think it is only fair to point out that there are some flaws in the situation so we will keep our perspective.

One of these is that the steel industry is nothing to write home about; it is not doing as well as had been hoped; it is doing better but still running at a fraction of capacity that leaves a great deal to be desired. The auto industry—another big one—is not going to set any records this year. Home building which has led the way out of the last three recessions is in the doldrums; in fact the single-family home building industry is just plain sick. There is no other word for it. Apartments are doing quite well, but the industry that declined last year was the single-family house; the industry that is recovering this year is the multi-family house, which is a different breed of cat altogether and is built by an entirely different process and by an entirely different group of builders, so we do have a depressed home-building industry, and will have for some years to come. Finally on the dark side, we have unemployment which is showing no signs of going down as a percent of the labor force; unemployment is remaining persistently high, it even went up a little in May. And this will go on for some years to come I am afraid.

Leaving aside those dark points, the real fact is that we are well on the upgrade and that, for the next eighteen months or so, there is very little on the horizon that we need to worry about in terms of the general business outlook.

Back in college I had a professor who used to keep a large crystal ball on his desk, here mounted, and he had a small one over there. People would always ask him what this was for.

"Well this is the latest economic forecasting device."

"Why two?"

"Very simple; the big one is for long-range forecasting and the little one for short-range."

Now I only say this to illustrate a point I want to make, and that is, that there are two futures and we usually talk about the short-range future. It's like being a states-

man—you can't be a statesman until you get elected, or you can't get into the long-range unless you survive the short-range. So businessmen naturally are more interested in the short-range.

This spring's auto sales, next Easter's clothing sales, next Christmas' toy sales, and so on, and they don't look too often beyond that. The trouble with it is that the short-range is here today and gone tomorrow; and the long-range we've got to live with for a long time, and so we ought to spend a little time on looking into it.

The chief characteristics of the 1950's—the decade we have just gone through—to me were growth and change. The chief characteristics of the 1960's, which we are just beginning, are going to be the same, only more so. More growth and more change.

I do have people asking me nowadays, "Whatever became of the soaring '60's?" (People call them the sagging '60's, the souring '60's—this was quite popular at the beginning of the decade, because of the recession.)

Well a recession doesn't have any effect really on the long range projections; in fact we assumed in our own 10 year projections two recessions, at least, in the '60's. The fact is that we are going to have in the '60's, come hell or highwater, tremendous growth in the United States. Our population will grow by a conservative estimate of 34 million people in ten years. Now how many is 34 million people? Well it means that every two years we will be adding the Chicago metropolitan area, suburbs and all, every two years. It means that in ten years we will add as many people as there are in Canada, Australia, and Cuba combined. In other words, our population would grow as much as if we had annexed Australia, Canada and Cuba. I am not recommending the annexation of Cuba.

As a matter of fact I read an issue of MacLean's magazine up here in Canada a few months ago, in which a letter to the editor proposed that Canada annex the United States and make it the 13th province—or 12th, whichever one it is. That is not a bad idea either, in some respects.

Well, anyhow, we are going to have this tremendous growth. I think that in the '60's the growth trend will not be a steady one, just like this, I think there will be some wiggles in it. I think we will see at least two recessions in the '60's and, it may sound strange, but I think that is a good thing, because on the day when we have an economy with no recessions we will have an economy that is in a rigid government-controlled strait jacket. A recession is necessary to the operation of an individual enterprise economy; not a depression, but we've got to have these wiggles and curve. If we don't have the wiggles, then we are going to be in an absolute strait jacket.

One thing we may find. The rate of growth, the percentage rate of growth, may be slower in the '60's than it was in the '50's, and this is not too surprising although a great deal was made of it back in the last election campaign, because in a post-war period it is only logical to expect that when the war is over and you have tremendous backlogs of demand and tremendous amounts of savings in the population's hands, it is only natural to expect that those floodgates will be opened to civilian production and you are going to have a big upsurge in total output, in total sales, and so on. . . in the years right after the war. You would not expect to keep this up at the same rate forever.

And what we have been saying is a sort of levelling off in growth curve as we have met these post-war backlogs. This does not mean that we are not going to have good normal growth rates in the future, But one thing is absolutely certain—absolutely—and that is that our business firms have been geared to the lush years of 1945 to 1955 in particular; they have diversified in all directions and they are going to be up against somewhat slower growth rates in the 1960's. This adds up to only one thing and that is more and fiercer competition for the profits that are there. There are going to be enormous profits, but it is going to be a lot harder for businessmen to get them. They are going to have to work harder. They are going to have to be more efficient. And, believe me, they are going to have to do something they have almost totally forgotten in the ten years after a World War II, they are going to have to get back and learn how to sell and how to serve the customer. And these are areas where there has been a great slippage in the post-war period.

Somebody in every audience brings up this point. I have talked about population growth as the main factor in the '60's and somebody is sure to say, "Now, look, what about China and India? They have enormous population growths and they are poverty-stricken, so why should it be good for the United States?"

Well I would say this. We have no resources in the United States that weren't available to the American Indian long before we or our ancestors came over here. The fact is that they had the resources but they didn't do anything with them.

What is the difference between what we have done and what the Indian did? Well, to me the whole thing boils down to an economic system that provides the elbow room for growth, gives vent to the know-how for growth, provides the freedom for growth. We have our greatest asset in this economic system. It is our greatest resource, the economic system that we have today, because with that system we can provide more people with higher standards of living continually and we can keep on doing this for many many decades to come. And as long as we do that population growth will be a boon rather than a burden.

My biggest worry for the future of the United States, and I will say this is also parallel in Canada, is the preservation of that system and, if I may wax controversial for a moment, I will say that if I were Mr. Krushchev I would be laughing my head off right now. I would be laughing at the United States doing its darnedest to move in my direction without my lifting a finger. I would be laughing at the threat to break up large industry, one of the most important strengths that we have in either a peaceful or a military fight with communism. We are dealing with a country—Russia—which only has one management and one industry, and yet there is a positive tendency in our country to divide our larger and most efficient industries into smaller and less efficient units.

And if I were Krushchev I would be laughing my head off. I would be laughing at the decline, the undermining of individual responsibility in this country, because in communism and collectivism there is no room for individual responsibility and we in our country are doing our utmost it seems to me at times, to undermine what individual responsibility we have left. If I were Krushchev I would be laughing at the increase of government control for everything in the United States because this is exactly what I would want. I would be laughing at the threat to destroy the American economy through inflation, through wilder and wilder spending schemes, and I would be laughing, I think most of all, at geographical Marxism spreading in the United States—and what do I mean by geographical Marxism—I mean federal aid to everything. Federal aid to highways, to schools, the whole kit and caboodle. There are no tax payers to the federal government who are not also tax payers to the states. There are no funds available to the federal government which do not come out of the pockets of citizens of the states. There is no magic in Washington that can add to those funds.

What are we doing? We are practicing a species of geographical Marxism, the principle of which is from each area, according to its ability, to each area according to its need. This is the basic tenet of Marxism and we are doing this through federal aid to everything.

I would like to ask just one question: If we think that our American system is better than collectivism then why not give it a chance and stop modelling it after collectivism?

I have one other worry for the future and that is international crises. I think we can only make one assumption and that is that there will be no all-out war. This is the only workable assumption under which you can forecast, because if there is an all-out war there is no point in trying to prepare your business affairs or storing your records in some mountain vault or something of that sort. Because if we do have an all-out war this world is going to be so totally different that there won't be any place for any of these worries. The only workable assumption is that there will be no all-out war; this is the basis on which I have operated in forecasting and, incidentally, as a member of the strategic bombing survey in Japan right after the war, in Hiroshima and Nagasaki while they were still bulldozing the bodies up, I would have to assume that there would be no nuclear war, because there isn't much question about what would happen to the human race.

And so we make that assumption. We still will have these crises; we still will have brush-fire wars. We are going to have one crisis after another and we are going to have crises in places we have never even heard of. We have managed to bear up through these crises before, and I have every confidence that we will do it again in the future. As a matter of fact, we are getting to be pretty good crises-bearer-up-underers. We are getting used to it.

Back to the economy. The short-range outlook is good, the next eighteen months or so. The long-range outlook is very good, if you allow for a few wiggles and curves,

which we would call recessions. The outlook is so good, as a matter of fact, that I am tempted to end this talk with just one little story, which I think points a moral.

A school teacher, from back east, spent a summer on a dude ranch in Wyoming, and while they were out there they took a few trips out there into the mountains—the rancher took all his dudes up. One day they got up a mountain-highway with a very sheer cliff and a precipice that just went straight down for a couple of thousand feet. There was no guard rail along the edge of it—no warning sign—no nothing!

And the school teacher took one look at the cliff and she said to the rancher, "Look shouldn't there be a warning sign up here of some sort?" And he said, "Well, to tell you the truth, ma'am, we did have a warning sign up there until about three years ago, but nobody ever went over so we took it down."

I do think that maybe we ought to keep the warning sign in place; we certainly must keep our eyes on these situations, but the best conclusion I can give you, and the most honest one, is that we are going to have one heck of a lot of problems of all sorts—that is one more thing we will have in the '60's—but we are also going to have quite a good business climate for the next decade, at least. Thank you very much.

PRESIDENT MOODY: Dr. Smith, on behalf of our Association, I want to thank you very much for this most excellent address. The next time I send in a fee to one of my insurance clients I am going to put down there in red ink, "Dr. Smith says times are real good", and I hope it will work. I don't have any illusions about that, however.

It was certainly a pleasure to have you with us, Dr. Smith, and I wish you could stay and enjoy our hospitality. I understand you must leave this afternoon and we regret that more of us will not be able to meet and know you.

(The President then called upon the chairman of the Open Forum Committee, the General Entertainment Committee, and other committees, who made announcements.)

PRESIDENT MOODY: The last item of business today is that of an appointment of a Nominating Committee. That always takes place at this time. This Nominating Committee has an extraordinarily difficult task; it keeps very long hours and makes considerable sacrifices. Now, this Nominating Committee is one that ensconces itself behind closed doors, it doesn't come out and seek your opinions, and for your opinions to be made known you must go in there and tell them who you feel should fill the offices that ought to be filled. It is never customary to announce in advance who this committee is going to be; there are all kinds of reasons assigned to it, but I have the sneaking suspicion that the basis of not telling is that there might be an exodus out of here, so we keep it pretty quiet who's going to be on the Nominating Committee.

The Chairman this year of the Nominating Committee is your past president, Wayne E. Stichter, of Toledo, Ohio; the other members are C. A. DesChamps, from San Francisco, California; Franklin J. Marryott, from Boston; William M. O'Bryan, Fort Lauderdale, Florida, and Alex Cheek, of Oklahoma City, Oklahoma.

Wayne will you please come forward and tell us what your plans are with respect to your meeting. (Thereupon the chairman of the Nominating Committee made an announcement. The meeting then adjourned.)

General Session

July 6, 1961

THE GENERAL Session of the Thirty-Fourth Annual meeting of the International Association of Insurance Counsel reconvened at 9:45 o'clock a.m., President Denman Moody presiding.

PRESIDENT MOODY: This is the closing session of the Thirty-Fourth Annual Convention and we'll all be going home today or tomorrow, I assume. We will open this meeting with an invocation and I will ask Father Lacoste—Abbe Norbert Lacoste, who by the way is the brother of Roger Lacoste, our distinguished member—to please give us the invocation. Father Lacoste!

ABBE NORBERT LACOSTE: Will you please rise. We must be thankful to God of all these meetings because we feel we are all sons of God, and this fraternity that is uniting us, is not merely human but it is also divine, and it is the will of God that we all work in all the different paths of life—bringing peace, bringing friendship, bringing also justice. May God help all of us.

PRESIDENT MOODY: Thank you, very much, Father Lacoste.

This is the largest convention that we have ever had. The largest convention before was 996 members. We now have registered 1,060. So apparently Montreal is a mighty fine place to have a convention.

(At this point the chairman of the General Entertainment Committee and the chairman of the Men's Tennis Committee were recognized; prizes were awarded to the winners of various contests; and thanks were extended to persons who had participated in convention arrangements)

PRESIDENT MOODY: The Defense Research Institute was established in July of 1960. The establishment of this institute followed eight long years of planning by quite a number of committees of the International Association of Insurance Counsel. We refer to this as DRI for short. All persons interested in furthering defense including insurers, self-insureds and all sorts of people who must defend themselves in the courts, are eligible to belong to this organization. This is the only organization of its kind. It has a great future and it fills a tremendous need. The man who has done the most to bring DRI into being is Stanley C. Morris. His long and untiring effort as Chairman of the Defense Research Committee has, in effect, amounted to a dedication of the last few years of his life to this endeavor. He is also Chairman of the Board of DRI and I will ask him to come forward at this time and give a report on the present status and activities of DRI. Stanley C. Morris!

Report Of The Defense Research Institute

STANLEY C. MORRIS
Chairman of the Board

LADIES and gentlemen, the Defense Research Institute has as its stated major purpose to enhance the knowledge and improve the skills of defense lawyers. If I were to state that in popular language, I would say that DRI aspires to be both coach and cheerleader for the defense.

The Defense Research Institute came into being after long years of study. One of the matters that was being studied was the fact that in this country the situation of the defendant in the personal injury field had been steadily deteriorating vis-a-vis the position of the plaintiff. We believe that DRI has been attacking that problem along the proper lines, and is making noteworthy progress.

DRI is less than nine months old. During that period thousands of non-compensated man-hours have gone into its work. We look forward to the employment of a full time executive director. Since mid-December last we have had a general manager and are operating a central office.

DRI took over the publication of the monthly newsletter, For the Defense, within a few months after it was created. DRI is a protege of the International Association of Insurance Counsel. When the institute was first organized IAIC advanced $5,000.00 and promised to advance a total of $15,000.00 to put DRI in operation. I'm proud to say that the $5,000.00 has been repaid and that there will be no request for the additional authorized $10,000.00.

The Institute conceives that its field includes a broad gauge study of personal injury problems as well as other defense problems, and the facilitating of communication among defense lawyers. Notable progress was made in the communication field during the past year with an attention-arresting result in one case, in particular. A substantial victory was had by a defendant on the question of the attempt to measure the dollar value of pain and suffering on a unit-of-time basis. Within three days after the handing down of the highly important decision of the Supreme Court of Wisconsin, the opinion was on the desk of our editor and was distributed throughout the country in the next issue of For the Defense.

Plans are now underway whereby For the Defense will be increasingly prompt in disseminating this type of information to defense lawyers.

In addition to the nationwide distribution of the newsletter, For the Defense, the Institute has published two monographs, The Revolt Against "Whiplash" and Products Liability. Some 9000 copies of "Whiplash" have been sent out and some 5000 copies of Products Liability. A third monograph, Evidence: Official Records, will be published September 1, and at least two more monographs are scheduled for issuance in 1961. These will be supplemented by some other pamphlets containing working tools for defense lawyers, including Current Decisions—1961, which will be mailed to all DRI members in December.

The Defense Research Institute belongs to all who choose to become part of it. Its functions, as a medium of communication, can only be discharged by the efforts—the joint efforts—of all those who are the beneficiaries of accelerated communication.

We have had gratifying success in procuring lawyers and law firms to become sponsors, of DRI. Sponsorship means a financial contribution on a non-recurring basis and several thousand dollars have been accumulated in the sponsorship fund. This money has been set aside in a separate fund and will be invested. It will serve as a reserve to strengthen our organization. We expect to operate upon the annual membership dues.

The firms who generously contributed as sponsors did not thereby acquire membership for all of their members or any number of them. However, sponsors may also become sustaining members by making application and paying dues to DRI. Information in this regard will be supplied by our central office. I am happy to say that in many instances the same law firms that have made sponsorship contributions to DRI, have also enrolled the individual lawyers as members of the institute.

The newsletter, For the Defense, was distributed to more than 5,000 recipients free of charge, at the beginning, but we have been compelled to abandon that program because of its excessive cost. Those of you who have been receiving the newsletter on a gratuitous basis have received your last copies. To receive the September issue of the newsletter, it will be necessary for you to become a member of DRI, or if you happen to be an officer or employee of an insurance company which has taken out a corporate membership, it can designate four persons to receive the four copies of the newsletter which are made available to the corporation as an incident to the corporate membership. Furthermore, it is possible for corporate members of DRI to obtain additional copies of the newsletter at nominal cost, and several companies are doing this and are distributing the additional copies among their claim personnel.

The directors of the Institute are confident that membership will result in substantial returns. We solicit all of you to become members. We think that every member of the International Association of Insurance Counsel should support the Defense Research Institute, and become a member of it.

Several particularly encouraging things occurred during the past year. Lewis C. Ryan, of Syracuse, became our President on January 31, 1961. I must say that this was the greatest single thing that ever happened to the Institute, even though we enjoyed his services but a few weeks. He passed away on May 10. During his presidency he made a tremendous contribution. His death was a great loss. Lew Ryan was, in my opinion, one of the most influential lawyers in Amer-

ica. To have served with him was a great privilege.

This year also saw the adoption by the Supreme Court of New Jersey of a rule forbidding the revelation of ad damnum demands to juries in personal injury cases. That was a recognition by the court of the fact that the astronomical ad damnum demand serves no proper function in a personal injury case. We expect to see the realization that this is so extend across the country.

A year ago in the Report of the Defense Research Committee we noted the fact that "whiplash" had become moribund. Since then, I am pleased to say that "whiplash" has become a sort of a forensic orphan, a filius nullius. You seldom hear it in court anymore, and you don't see it in the pleadings of knowledgeable plaintiff's lawyers.

We also predicted that the attempts, nationwide, to measure pain and suffering in dollars on a unit-of-time basis would fail. There has been a pitched battle in that field throughout the last twelve months. I believe that measurable progress has been made. The editors of For the Defense would like to know whether there are test cases pending on that subject in your various states. Please report that information as soon as possible. If any of you who have test cases, or know of the pendency of such cases, will call at the desk of our business manager, Charlie Lee, after this meeting, he will be able to assist you.

We have been happily successful in our effort to find a successor to Lew Ryan. We went down to the great state of Texas and procured a terrific Texan. The only kinship that my little state can claim to Texas is that if we ironed it all out and got rid of the wrinkles it might be half as big as Texas. The man who was obtained to take the Presidency of DRI is Josh H. Groce. He is here, and I want to present him to you. Josh H. Groce of San Antonio, Texas.

MR. JOSH H. GROCE: Our business manager is here, Charlie Lee. I'd like him to stand up and take a bow.

Charlie is maintaining a desk in the lobby outside the meeting hall. If any of you here have not yet affiliated with DRI and choose to do so before you leave the city, he will be out there to function, and I hope you will choose to join with us. Thank you very much.

PRESIDENT MOODY: Thank you Josh. I think everyone can see that his heart and soul are in this work and I hope that everybody here who has not joined DRI will do so.

If there is no unfinished business or new business to come before the meeting, we will pass on to our main address for this concluding session. Our main speaker who will address us this morning is a prominent and outstanding member of the Canadian Bar Association. I'm going to have him introduced to you by a member of the International Association of Insurance Counsel who practices law in Ottawa, Canada. It is a pleasure to present Adrian T. Hewitt who will introduce our main speaker. Adrian, will you come forward please.

MR. ADRIAN T. HEWITT: Monsieur le president, mesdames, monsieurs. . . it is my honor to introduce to you today the guest speaker at this closing session. This of course, is always the highlight of the meeting of the International Association of Insurance Counsel.

Our speaker was born in Halifax, Nova Scotia in the year 1904. Those responsible for his education showed remarkably good judgment and immediately sent him to Ottawa, that is the capital of Canada beautifully located on the Ottawa River about one hundred and twenty miles northwest of this city. There he attended Ashbury College. After graduation he then attended Dalhousie University in the City of Halifax and obtained the degree of Bachelor of Arts in the year 1924, and in the year 1926 graduated from the same university in law. He entered practice in the city of Halifax in the same year and today is the senior partner in the firm of McInnis, Cooper and Robertson.

He is married, the father of four children, and two of his sons are now members of his own firm. He continued his career at the bar and was appointed one of Her Majesty's Counsel learned in the law in the year 1941. He holds directorships in many large Canadian corporations and is the Chairman of the Board of Governors of Dalhousie University. He's had a distinguished career at the bar and included in his practice has been the representation of many insurance companies and he is now counsel for the All Canada Insurance Federation which has the responsibility in this country of looking after the interests of the insurance industry. Perhaps the best way to give you some insight into the personality of our speaker is to tell you a small anecdote. I think this

will illustrate the ready wit and the versatility that he has acquired as counsel. He had been appearing in the Appellate Court for his province frequently over a period of time, and finally, on one occasion, he was presenting an argument on behalf of his client that sounded quite opposite to the argument he had been submitting a few days earlier on behalf of another client—as a matter of fact he found himself taking the exactly opposite position in his submission to the court and his attention was drawn to this fact by one of the members of the court. He said, "Well now Mr. McInnis, how is it that you are presenting this argument? If I remember rightly just three days ago you presented exactly the opposite argument."

He said "Yes my Lord, it was a silly argument, wasn't it?"

Ladies and gentlemen, here in Canada we have no national flag; we have no national anthem, contrary to anything you might have heard during this convention, but we do have a Canadian Bar Association. The Canadian Bar Association has a President; the President is Mr. Donald McInnis, Queen's Counsel, and I present him to you now.

Glimpses At Advocacy

DONALD MCINNIS, Q.C.
Halifax, Nova Scotia, Canada

IT HAS been frequently said that the art of advocacy is fast declining. No doubt this has been brought about in consequence of the doing away, in a large measure, with the jury trials and as well the advent of administrative boards and government bodies which are encroaching upon our courts of law. Rhetoric or advocacy as was known in the past, has little place in any tribunals of such a nature and, indeed, before a single judge, persuasion by way of oratory is out of place. In this day the ability to understate the case is regarded by some as being more effective than the flowing phrases of the advocates of days gone by. Nevertheless, there still remains the lawyer's weapon of able direct and cross-examination. If these comments are worthy of any title, I would give them the heading, "Glimpses at Advocacy".

It is to be remembered that the great advocates of the past, and indeed, orators of years gone by, did not have the benefit of mechanisms for enlarging upon the volume of the voice, and consequently the ability to allow the audience to hear depended upon the enunciation of the speaker, and perhaps too, the volume of his voice. It is said of Demosthenes that as a young man he stuttered and had little power of expression. To overcome this he practiced speaking in an underground chamber with a view to producing volume to hear the resonance of his own voice. As for Cicero, writers of old have told us that at first he had a harsh strident voice, but with practice his tones became well modulated and pleasing.

Like most arts, there are certain fundamental rules or principles to give effect to the best manner of submitting an argument or supporting a proposition of fact or law. I believe that the great advocates studied their speeches or submissions with great care. Preparation was the secret and as well a knowledge of human nature. One cynic has defined advocacy as—"Spokesmanship; or the art of misleading an audience without actually telling lies." Lord MacMillan has said: "The lawyer indeed may not be unfairly described as a trafficker in words."

Great beauty can be derived from a happy choice of words. Color can be produced by an association of words which of themselves have little lustre. A knowledge of language enables the speaker to describe his meaning effectively.

The great Lord Mansfield has said that "most of the disputes in the world arise from words." "When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more, nor less." "The question is," said Alice (Through the Looking Glass) "whether you can make words mean so many different things." Words and advocacy then are the tools of our trade and our work can always be open to comment and criticism. The process of analogy, discrimination and deduction should be within the prowess of the lawyer. He must be able to distinguish between the fallacious argument and what is proper syllogism and the ability to deduce and adduce must be his forte.

A complete knowledge of the best literature was possessed by the great advocates. Lord Chatham boasted that he twice read through Bailey's Dictionary to understand the meaning of words. Browning, Stevenson and Kipling learned the meaning of our language in a similar way. Johnson literally devoured whole libraries. It is said of Abraham Lincoln that to understand the use of the word "demonstrate" he mastered all the theorems of Euclid. A student of advocacy will be familiar with the works of Dickens, where we have much background framed in law, and as well Sir Walter Scott, concerning which Guy Mannering has a legal theme, and many others. The great parliamentarians who were masters of the classics drew upon them to give expression to their advocacy.

I suppose not many now read the Orations of Cicero, either in the English or the

original Latin. Examination of such Orations will show that the manner of speaking of Cicero did not greatly differ from the eloquent advocates of later times. Cicero has left us an essay in this respect which was composed soon after the Battle of Pharsalia and was intended by him to contain the plan as to what he himself considered to be the most perfect style of eloquence. He has said in part:

"The eloquent orator is a man who speaks in the forum and in civil causes in such a manner as to prove, to delight and to persuade. . . but the foundation of eloquence, as of all other things, is wisdom. . . There must be a sort of easy style, and yet not utterly without rules, so that it may seem to range at freedom, not wander about licentiously. . . The language will be pure and Latin; it will be arranged plainly and clearly, and great care will be taken to see what is becoming." Therefore, a simple orator to be eloquent is not bold in the manner of making words. He is modest in his metaphors, sparing in his use of obsolete terms, and humble in the rest of his ornaments of words and sentences. He will avoid such insults as are not to be healed.

To go to an earlier age, even now the "Apology" of Plato on Socrates can be read with profit. The scene is in the court and Socrates *is warning* his audience against his own eloquence. Socrates speaks: "How you, O Athenians, have been affected by my accusers, I cannot tell; but I know that they almost made me forget who I was—so persuasively did they speak; and yet they have hardly uttered a word of truth. But of the many falsehoods told by them, there was one which quite amazed me;—I mean when they said that you should be upon your guard and not allow yourselves to be deceived by the force of my eloquence." Socrates ends his oration with a plea of clemency for his children and descendents: "When my sons are grown up, I would ask you, O my friends, to punish them; and I would have you trouble them, as I have troubled you, if they seem to care about riches, or anything, more than about virtue; or if they pretend to be something when they are really nothing. And if you do this, both I and my sons will have received justice at your hands. The hour of departure has arrived, and we go our ways—I to die, and you to live. Which is better God only knows."

The plea for clemency is perhaps one of the most important of all the powers of the advocate and may often produce the best results. If the advocate is able to obtain a lesser sentence or strike a cord in the hearts of the jury or judge, then his function has been well served. I might be forgiven for referring, not to a plea in real life, but to a plea made on the floodboards of the stage. So, so well known. It is the cry for mercy!

It blesseth him that gives and him that takes.
Tis mightiest in the mighty; it becomes
the throned monarch better than his crown;
His sceptre shows the force of temporal power
The attribute to awe and majesty
Wherein doth sit the dread and fear of Kings,
But mercy is above the sceptre sway—
It is enthroned in the heart of Kings
It is an attribute to God himself.
An earthly power doth thou show likest God's
When mercy seasons justice.

Failure to exercise clemency has made notorious for all time Judge Jeffrey. The bloody assizes are remembered for their infancy. The walls of the court room on the orders of Judge Jeffrey were draped in scarlet cloth. This feature no doubt led to the name of the assizes. The injustice was great. Hundreds were hanged, drawn and quartered. Alice Lisle was sentenced to be burned alive. This brutality shocked even the most ardent of the King's supporters and hanging in the marketplace of Winchester resulted. It is said that so loathsome was Jeffrey's name that when he had been dead many years and his title extinct, his granddaughter, the Countess of Pomfret, travelling in Somersetshire, was insulted by the populace and found she could not safely venture herself among the descendants of those who had witnessed the bloody assizes. The name of James II was reviled by many in his time for failure to exercise mercy.

Sometimes the witness, or the accused, can become the advocate. You will recall that in the greatest trial of all time where the charge was really one of blasphemy, Pilate said to Christ, "Do you say that you are the King of the Jews?" The answer was, "Thou sayest it". For a long time I had thought that Christ did not utter the damaging words which his accusers wanted to hear, that he was the King of the Jews. Subsequently I have learned that in the Aramaic of the time there is no such word as "yes".

Moffett, in his translation of the New Testament, has interpreted the word "certainly". "The words are yours; it is as you say". My point is that on occasion the witness will avoid the directness of the question and in part become the advocate himself.

Do you remember the ability with which Joan of Arc defended herself when she was questioned for 15 days by 60 judges or assessors from the faculty of the University of Paris. Her defence has also been made manifest by the playwright, George Bernard Shaw. Her accusers were examiners and masters and doctors of theology and French law, and Joan, unlettered and untutored, had no counsel. Yet they could not confound her; but she was burned at the stake. Her answers reflected her honesty, boldness, simplicity and greatness of heart.

Q. Have you then command from your voice not to submit yourself to the Church Militant, which is on earth, not to its decision?

A. I answer nothing from my own head; what I answer is by command of my voice; they do not order me to disobey the Church, but God must be served first.

But our heroine cannot rest in peace. Only a short time ago I read the review of a new book "Operation Sheperdess". In it, it is said that Joan was not the simple country maiden of legend and that she never tended a single sheep. She was said to have been highly connected and was really a political pawn, although there is no doubt about her trial. She was short and stocky and an ample bosomed brunette as contrasted with the heroine of fiction—a tall golden haired girl. It is also said that she was not burned at the stake but that some unknown woman took her place. In support of this picture of the suggested real story, the author asks why it was she arrived at the execution square with her head covered. Why is there no record of her death in the city's records? Why were the populace kept by the soldiery to the side streets and not permitted in the marketplace?

For my part, I prefer Bernard Shaw—and to bring him into the subject of advocacy I would recommend the reading of the first part of the judgment of Mr. Justice Harmon in (1957) 1 W.L.R. 731, which concerns itself with the will of Shaw and his theories of language.

Can you not also recall the beautiful language of Sir Walter Raleigh in his attempt to save his life from the charge of treason. He referred to the death of Queen Elizabeth—"A Lady whom time had surprised". Coke, as prosecutor and attorney general, had attributed to Raleigh knowledge suggesting the annihilation of King James and his family. This trial and Coke's venom marred his otherwise remarkable career. Coke opened his case to the court by the statement, "You shall see the most horrible practices that ever came out of the bottomless pit of the lowest Hell". Coke let the words roll from his lips managing during the recital three times, "Now let us destroy the King and all his cubs, not leaving one." Raleigh speaks:

Raleigh: "O, barbarous, do you bring the words of these hellish spiders against me? If they, like unnatural villains used these words shall I be charged with them?"

Coke: "Thou art thyself a spider of Hell for thou dost confess the King to be a most sweet and gracious Prince; yet thou has conspired against him."

Do not these words sound like the words of Shakespeare? Indeed, our language was, during that period, in full flower.

Even now there is some doubt as to Raleigh's guilt—not of treason but at least that of conversations with Spanish agents. There were too many recantations and renunciations. How can we explain the throwing of a letter enclosed in an apple to Cobham then a prisoner in the Tower. Did Raleigh bargain with Aremberg for a flat yearly pension of £ 1500 in return for supplying services "to tell (said Lord Coke) and advertise what was intended by England against Spain, the Low Countries or the Indies."

It is strange that a number of authors have attributed to their heroes the title, "For the Defence". I refer to Lloyd Paul Stryker's able work on Lord Erskine; the work by Majoribanks, "The Life of Sir Edward Marshall Hall", the great English barrister of a half century ago, and as well the story of an advocate of great competence, Clarence Darrow. It is impossible in the short time available, to compare the abilities or eloquence of these several advocates. Let us recall for a moment the speech of Clarence Darrow of some 35 years ago, in his summation in the Sweet case which concerned a charge of murder arising out of the shooting of a spectator and possibly

an agitator when some negroes moved into a white district in Detroit. The story is too long to tell, but Darrow said: "We come now to lay this man's case in the hands of a jury of our peers—the first defense and the last defense is the protection of home and life as provided by our law. We are willing to leave it here. I feel, as I look at you that we will be treated fairly and decently, even understandingly and kindly. . . And, after all, the last analysis is, what has man done? —and not what has the law done? I know that before him there is suffering, sorrow, tribulation and death among the blacks, and perhaps the whites. I am sorry, I would do what I could to avert it. I would advise patience; I would advise toleration; I would advise understanding; I would advise all of those things which are necessary for men who live together."

The great advocates produce a picture in words. The phrases must be like the strokes of a brush to produce a graphic effect. The language is simple and clear; the sentences are frequently short, and the words which are found to be most expressive are words in common usage. If the address or examination is to a jury the statements must have the attribute of clarity so that they will be understood. The advocate is speaking to the reasonable man. He is endeavoring to produce a scene that can be assembled in the juror's mind. He draws upon all his knowledge. He becomes a craftsman of words. He is building for the effect his words will have on the ears of his audience. Sir Norman Birkett, as he then was, reminds us in his address to the American Bar and the Canadian Bar in Washington in 1950, on "Law and Literature," that some of the younger members of the bar are apt to wonder wherein the powers of the great advocates resided. He told us that the younger Pitt once said that some wondered at the enormous reputation of Charles James Fox. "Ah! But you have never been under the wand of the magician". The advocate must call upon all his resources. He must be in part actor, part orator, and give to his audience the understanding of sincerity and courage—above all he must give of himself; that is the most important element of all.

Hear, now, how the great advocate, Daniel Webster, stated his case in the summation in the trial of John Francis Knapp for the murder of Joseph White. Strangely enough, in this case, Webster was in the role of prosecutor rather than defender. "The assassin enters, through the window already prepared, into an unoccupied apartment. With noiseless foot he passes the lonely hall, half lighted by the moon. He winds up the ascent of the stairs, and reaches the door of the chamber. Of this he moves the lock, by soft and continued pressure, till it turns on its hinges without noise, and he enters, and beholds his victim before him. The room is uncommonly open to the admission of light. The face of the innocent sleeper is turned from the murderer, and the beams of the moon, resting on the gray locks of his aged temple, show him where to strike. The fatal blow is given, and the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death!"

The jury must have envisaged the whole of the awful scene as though it were enacted by players in a playhouse. Would that I had time to review the cross-examination of Webster's companion in great advocacy and refer to the cross-examination of the Wizard of the Law, Rufus Choate, in the Russell Sage case. The reading of such cross-examination sets out in a most telling style what happened. You see the millionaire, Sage, gently thrust an innocent bystander before him as a shield before the bomb exploded. The subtlety and cutting effect of the questions reveal the work of a true master of advocacy.

Students of advocacy are fond to support their own heroes as to which is the greatest advocate of all time. For myself, there is no doubt about this. I believe it is generally accepted that Thomas Erskine, the Scot who later became Lord Chancellor of England, was the greatest of them all. He lived in a period of great stress and revolution. I refer to the period of the French Revolution and later years. The audience was in the tens of thousands and great interest and excitement followed. Charges of criminal libel and treason were frequent. Erskine usually led for the defence. Mobs moved through the streets following the trial of Lord George Douglas, pillaging and burning. In this period the great Erskine reigned supreme. He lived in the period of the great names, including Pitt, Fox and Burke who were the outstanding parliamentarians of that era. Strangely enough, in "The Lives of the Lord Chancellors," by Campbell, dealing with Lord Erskine, there is related the incident of his maiden speech in the House. He had already gained a tremendous reputation at the bar and the whole of the Commons were waiting to hear what

this man, an orator of the courts, had to say. The debate concerned the famous India Bill. It is said that Erskine's performance was tame and destitute of the animation which so powerfully characterized his speech in Westminster Hall. However resplendent he appeared as an advocate when addressing a jury, he fell to the level of an ordinary man—if not below it—when seated on the Ministerial Bench.

According to one graphic representation of the scene, Erskine's faculties were on this occasion paralyzed by the by-play of his opponent. Pitt intended to reply. He sat with pen and paper in his hand and prepared to catch his arguments of this formidable advocate. He wrote a word or two. Erskine proceeded, but with every additional sentence Pitt's attention to the paper relaxed. His look became very careless and he began to think the orator less and less worthy of attention. At length when every eye in the House was fixed upon him, with a contemptuous smile he pushed the pen through the paper and flung them to the floor. Erskine never recovered after this expression of disdain. His voice faltered—he struggled through the remainder of his speech and sunk into his seat, dispirited and shorn of fame.

Most dramatic of all was his introduction to the bar—that is to say, his first case. It concerned the trial of Captain Baillie. The accused man had made some allegedly libellous statements concerning Lord Sandwich and one of the other administrators of one of the naval hospitals. Baillie overheard Erskine's vociferous remarks and decided to retain him. However, Erskine found that he was only one of five counsel and the last of these. As the trial progressed it seemed hopelessly lost. On the day before the closing of the defence, and just before adjournment, Erskine arose from his place and addressed the court which was presided over by Lord Mansfield, Erskine said: "My Lord, I am likewise of counsel for the author of this supposed libel". Then followed one of the most masterly orations of all time.

It is said by spectators that they sat in a trance of astonishment. It was regarded as eloquence in the truest sense and spoken with a complete simplicity. I need not tell you the result. Afterwards Erskine was asked how he had found the courage to stand up so boldly to Lord Mansfield (who, by the way, was a fellow Scot and the founder of commercial law in England). "I thought," he answered, "I felt my little children plucking at my robe and crying out to me—Now, Father, is the time to get us bread."

Lord Brougham said of Erskine that they felt it impossible to remove their looks from him when he had riveted, and as it were, fascinated them by his first glance; then hear his voice of surpassing sweetness, clear, flexible, strong, exquisitely fitted to strains of serious earnestness, deficient in compass, indeed, and much less fitted to express indignation or even scorn, than pathos, but wholly free from harshness or monotony.

It is said with respect to his professional merits—"I ought by no means to omit his skill in examining witnesses, upon which the event of a cause often depends more than fine speaking." When he had to examine in chief—not, as in common fashion, following the order of the proofs as set down in the brief—he made the witness lucidly relate, so as to interest and captivate the jury, all the facts that were favourable to his client. In cross-examination he could be most searching and severe but he never resorted to browbeating, nor was gratuitously rude. Often he carried his point by coaxing; and when the witness could not be contradicted, he would try by pleasantry to lessen the effect of it. The Edinburgh Review referred to the "witchery of this ordinary man's voice, eye and action."

The power of cross-examination is one of the great powers of an advocate who is skilled in this respect. . . So many stories of cases have been related, that it is difficult to determine which is the most telling. One of the classic examples concerns the trial of Queen Caroline before a committee of the House of Lords. It is to be remembered that her husband, George, the King, was endeavouring to get rid of her and charged her with misconduct with various Italian servants. The kingdom was in a high pitch of excitement and the common people were all for Caroline. Brougham destroyed the witnesses for the King by an examination which displayed an advocacy unparalleled in English annals. The witnesses were for the most part Italian servants who did not speak English and were forced to testify through an interpreter. Brougham's cross-examination was so forcible that the most important witness was frequently repeating the phrase, "Non Mi Ricordo"—I do not remember. The result was that throughout the whole of the United Kingdom the catch phrase of the populace was—"Non Mi Ricordo". Den-

ham, Counsel for the Queen, made one of the faux pas of all time in addressing the jury. His speech was in part: "If no accuser can come forth to condemn thee, neither do I condemn thee; go and sin no more." His last words rung like a pistol shot and as the impact of his faux pas dawned on the House of Lords, smiles gave way to laughter. What was intended as the climax of his appeal had become a plain admission of his client's guilt. It was a bad mistake but it was overcome. Denham later wrote that the phrase "has given me some of the bitterest moments of my life." It is to be recollected that the case resulted in a six-months hoist, much to the joy of all Englishmen.

Again, coming to the destruction of the witness, reference may also be made to the examination of Oscar Wilde by Carson. Oscar Wilde had brought a charge against the Marquis of Queensberry, the father of Lord Aldred Douglas. Queensberry charged Wilde with "posing as a sodomite". In his opening questions Carson showed Wilde to be untruthful as Wilde had stated that he was 40 years of age.

Q. You stated that your age was 39. I think you are over 40. You were born on the 16th October, 1854. Did you wish to pose as being young?
A. No.
Then Carson shot:
Q. That makes you more than 40.

Wilde displayed all of his wit, at first with apparent great effect. Speaking of a letter Wilde had written—"I think", said Wilde, "it is a very beautiful letter. It is a poem. You might as well cross-examine me as to whether a sonnet of Shakespeare was proper."

"Apart from art", questioned Carson.

"I cannot answer apart from art."

"Suppose a man who is not an artist had written this letter, would you say it was a proper letter?"

"A man that was not an artist could not have written that letter", Wilde replied.

Picking up another letter Wilde had written, Carson asked, "Is that an ordinary letter?"

Wilde answered with a condescending smile, "Everything I write is extraordinary. I do not pose as being ordinary."

However, the tireless rapier of Carson prodded on until finally Wilde was overcome. From that time forward he ceased to be a person of consequence in England.

It has been said, too, that Rufus Isaacs, then attorney-general, destroyed Frederick Henry Seddon in his opening questions in cross-examination. You will recall that Seddon and his wife were defended by Sir Edward Marshall Hall. Perhaps Hall made the mistake of allowing Seddon to go on the stand; but Seddon looked forward to the trial of wits with the great Sir Rufus Isaacs. The charge was that Seddon had administered arsenic to the "old girl" Eliza Barrow. She had some money and Seddon obtained her little fortune in return for an annuity of £150 a year. She did not live long after these arrangements were made. Seddon buried her in a common grave. Isaacs' first questions on cross-examination were:

Q. Miss Barrow lived with you from the 28th July, 1910, until the morning of the 14th September, 1911.
A. Yes.
Q. Did you like her?
A. Did I like her —
Q. Yes, that is the question.

Seddon was placed on the horns of a dilemma. If he said that he liked her, he was a hypocrite. If he said "no", his case was prejudiced. He endeavoured to escape by saying, "She was not a woman you could be attracted to." "I deeply sympathized with her." The damage was done. The love of gold was his undoing.

Rufus Isaacs' great attributes were his quiet manner, his sympathetic approach and his enagaging way of asking questions. He was patient and relentless and displayed unfailing courtesy. With these weapons he was a leader of the bar and brought to himself fame as one of the great advocates of his day.

I cannot pass on without mentioning also the great powers of examination displayed by Sir Edward Marshall Hall. The jury rested in his hands. Amongst others the author relates the case of Rex v. Dyer which concerned a charge of murder against a young woman who had killed an infant. She was overhead to remark, "How can anyone kill a baby like this", or words to that effect. This statement was introduced by the prosecution with a view to establishing an intent and motive. Marshall Hall, in his address to the jury, completely changed the emphasis and he said that the expression of this woman showed complete innocence —"How *can* anyone kill a baby like this"— to show that such an action would be beyond comprehension. Needless to say, the young woman was acquitted.

Some of you who have read this book might recall, too, the story of the trial of Marie Hermann. She was a street prowler and known as the "Duchess". No doubt she gained this description as a result of her regal ways. She was overheard to utter the words, shortly before the discovery of the murder—"Speak, speak, speak." Were these words uttered in passion as this woman struck the man with an iron poker, or, were they expressions of alarm and concern of a woman holding the wounded man who allegedly had attacked her, in an endeavor to make him speak so she could see if he was badly hurt. The histrionic abilities of Marshall Hall are perhaps reasonably well known.

Powers of advocacy are not admired by all and, indeed, critical comment has been made on the purpose and intention of advocacy. Jerome Frank, in his work from "Courts on Trial" has said, "The lawyer not only seeks to discredit adverse witnesses but also to hide the defects of witnesses who testify favorably to his client." If, when interviewing such a witness before trial, the lawyer notes that the witness has mannerisms, demeanor-traits, which might discredit him, the lawyer teaches him how to cover up those traits when testifying. He educates the irritable witness to conceal his irritability, the cocksure witness to subdue his cocksureness. In that way, it is said the trial court is denied the benefit of observing the witness's actual normal demeanor, and thus prevented from sizing up the witness accurately.

It has been said, also, by another critic, Eggleston:

> In cross-examination, the main preoccupation of counsel is to avoid introducing evidence, or giving an opening to it, which will harm his case.

What should the attitude of the lawyer be in presenting his case. Obviously he has been retained to adduce the evidence to the best advantage of his client and to set aside or lessen the effect of evidence given against the interests of his client. That is the role of all of us. If the lawyer were not able to produce for his client everything favorable for his side of the case, then of course there would be no purpose in having counsel at all. Counsel's main purpose is to put forward his best effort for the case of his client, but he should always be careful not to adopt tactics which are unfair or prejudicial to the interests of justice. Probably there will be no ideal means of always obtaining justice. Some of the critics would recommend, for the purpose of civic cases, a counsel or lawyer in the nature of a Queen's Proctor whose duty would be to act primarily for the court and whose main purpose would be to endeavour to produce all that is favorable or unfavorable for either side.

The great Samuel Johnson has defended our profession ably. Boswell asked, "But, Sir, does not affecting a warmth when you have no warmth—does not such dissimulation injure one's honesty?"

Johnson replied, "Why no Sir, everybody knows you are paid for affecting warmth for your client and it is therefore no dissimulation."

The unthinking public will often ask, "Why does a lawyer represent a client whom he knows to be guilty?" I will not waste time dealing with a question of such a nature. The answers are too well known amongst lawyers and, indeed, are all contained in many articles including that of A. S. Cutler—"Is a lawyer bound to support an unjust cause?"

Criticisms of the nature I have mentioned have come down through the years. I refer to an article entitled, "Lawyers and the Public", in Volume 18 of the Law Quarterly Review which was written in 1902. There, it was said:

> I think, therefore, that we may take it as established both as a matter of opinion, professional as well as lay, and as a matter of law, that the function of the legal profession ought to be and is the administration of justice.

Such comment was made in answer to the charge put forward by Leckie in the "Map of Life" where the subject of the ethics of advocacy is to some extent dealt with. It was said in part—

> But necessary and honourable as the profession may be, there are sides of it which are far from being in accordance with the austere code of ideal morals.

It is idle to suppose that a master of the art of advocacy will merely confine himself to dispassionate statements of the facts and arguments of his side, he will inevitably use all his powers of rhetory and persuasion to make the cause for which he holds a brief appear true, although he knows it to be false; he will affect a warmth which he does not feel and a conviction which he does not hold. He will skillfully avail him-

self of any mistakes or omissions of his opponent or of any technical rule that can exclude damaging evidence and so on. What is the right and proper way? The general answer evidently is that it is that way which is most calculated to promote the interests of justice. As lawyers, having as we have a great tradition, I believe that the ethics of our profession are as high as they ever have been and the great purpose and desire of the tremendous majority of counsel in this country is to do what is fair and proper. That, I am sure, is the desire of this great Association before whom I now appear—the desire to promote the interests of justice.

PRESIDENT MOODY: Thank you very much Mr. McInnis, for coming down here to Montreal and giving us this very fine address. You not only gave us a wonderful talk regarding advocacy, but you gave us a very fine example of it in your presentation. And we certainly do thank you.

I personally wish to thank the members of the Executive Committee, and the co-chairmen and members of our standing and convention committees, for making this Thirty-Fourth Annual Meeting such a success. Our thanks also go to the management of The Queen Elizabeth and especially to Tom McAlevey and his expert helpers for the wonderful job that they have done so far.

Now I almost overlooked our hardworking nominating committee. . . I don't know what has become of them, I haven't seen any of them today; I don't know if they have reached a decision. It may be that they will wish to move up to Quebec and continue their deliberations up there for a week or two. But let's call Wayne Stichter up—our Chairman—and see what they have been able to do. Wayne will you come forward please.

Report Of The Nominating Committee

WAYNE E. STICHTER, *Chairman*
Toledo, Ohio

MR. PRESIDENT, and ladies and gentlemen: I wish to submit at this time the Report of the Nominating Committee signed by all members, namely Alex Cheek, of Oklahoma, Al DesChamps of San Francisco, Franklin Marryott of Boston, Bill O'Bryan of Fort Lauderdale, and myself, as your chairman.

As I said on the opening day at the opening session, the job of the nominating committee is indeed an arduous one, and I think I can speak on behalf of all members of the committee when I say that it is also a very rich and rewarding experience, to sit down with your fellow lawyers—four others—and discuss objectively and conscientiously the qualifications of the men whose names are submitted to you.

Your nominating committee met on Tuesday from 2:30 to 5:00 in the afternoon, and Tuesday night from 10:30 to midnight; Wednesday morning from 10:30 a. m. to 12:45, again from 4:00 to 6:00, and again last night from 10:30 to twelve o'clock. I am giving the hours during which we had sessions at which members of the Association were invited to appear. In addition to that we had some executive sessions; the last of which ended at two o'clock this morning.

Nearly 100 members of this association appeared and gave the committee the benefit of their views and recommendations. It was indeed heartening to see the attitudes manifested by the many who appeared before your committee. After very careful consideration and deliberation, your committee has made the following unanimous nominations; unanimous as to everyone of the nominees whose names I will now present:

On the Executive Committee—three men to be elected, each for a term of three years—we unanimously propose the following nominations:

Gordon R. Close, of Chicago, Illinois, Wiley E. Mayne, of Sioux City, Iowa, Wallace E. Sedgwick, of San Francisco, California.

For Vice-President, for a term of two years: James P. Allen, Jr., of Boston, Massachusetts.

Secretary-Treasurer for a term of one year: George McD. Schlotthauer, of Madison, Wisconsin.

And for President-Elect: William E. Knepper, of Columbus, Ohio.

Respectfully submitted, and signed by all members of your committee.

Mr. President, your committee submits these nominations of these men for the offices that I have mentioned, and I now move the approval and adoption of the report of the nominating committee.

MR. SANFORD M. CHILCOTE: Mr. President, I second the motion.

PRESIDENT MOODY: Thank you Wayne. On behalf of the International Association of Insurance Counsel we certainly thank you for a job well done. The motion has been made and seconded. I first though wish to ask if there are any further nominations from the floor.

The motion has been made and seconded that the nominations be closed. . . and I interpret it to mean, also, that the Secretary be instructed to cast an unanimous ballot on these nominations.

All in favor say "aye". (Chorus of "ayes".)

All opposed?

The "ayes" have it.

And your officers are elected.

I will ask the following officers who have been elected to come forward; I will leave Mr. Knepper out at this moment.

George Schlotthauer will you come down in front here so that we can look at you again.

And is Mrs. Schlotthauer here? Will the wives please come forward also.

Jim Allen, will you come forward, please, and Mrs. Allen.

Gordon Close, will you come forward please, and Mrs. Close.

Wiley Mayne, will you come forward, and Mrs. Mayne.

Wally Sedgwick and Mrs. Sedgwick please.

You will notice that I have not asked the other officers to come forward, those of us

who are retiring. I didn't want you to see us compared to these fresh faces. I am afraid the contrast would be too much of a shock.

Here are your newly elected officers and their wives, and I know they will do a great job for you. I congratulate the Association for selecting such a wonderful group. I think they look real good after the three days and nights that we have had here. So let's give them a hand.

I now take great pleasure in asking Charlie Pledger and Tiny Gooch to escort my lovely wife up here—if you will do that please.

Ted has done a great deal to put this convention on; she has told me what to say and has approved of everything that I have done. . that is during the daytime. They say you can get along without these lovely ladies, but why should we try?

I now call upon John Kluwin and Lowell White to escort to the platform your new First Lady—Mrs. Sue Karr.

Your new President is a man of great ability; he has served this convention in many many capacities over the years. With his fine leadership I am certain that the good work of the International Association of Insurance Counsel will progress and will go on to new heights. I will now ask George Yancey and Bill Baylor to escort Payne Karr to the platform—your new President!

Payne, I welcome you to the platform and I want to present you with your gavel, which you will use to preside for the coming year. And I know that you will do a great job for the Association and so let's go with it.

PRESIDENT PAYNE KARR: Mr. Moody, ladies and gentlemen: Those of you who have attended previous meetings of this organization as many of you have, may have observed that the installation of a new President occurs in the last minute of the last meeting on the last day of our convention. I do not believe that is happenchance; this is an insurance organization and I strongly suspect that this tradition was developed as a means of insuring you against a long winded address of plans for the future.

Many people have been thanked for their contributions to this organization during the past year. I want to extend not alone my own, but your thanks, to an additional individual. Part of the education of a President-Elect, I have learned during this past year, is delivered by receiving copies of the correspondence of the incumbent President. I have had many opportunities to observe Denman's work on your behalf during the year just ended, but nothing could have impressed me so much as to the innumerable responsibilities he assumed and the effective way in which he discharged them than the multiple letters I have received which helped me to learn what was going on in the organization and certainly emphasized the job that Denman Moody was doing on our behalf throughout the year. We have also seen that demonstrated at this fine convention, which he organized and has directed. Let's all give Denman a rising vote of thanks.

The assignment you give me as President of the International impells me to deliver a prayer which I am told was used by a colored revival minister in a Georgia-turpentine camp as he opened a meeting.

"O Lawd," he said, "gib dy serbant dis mo'nin, de eyes of de eagle and de wisdom ob de owl,
Connect his soul wid de Gospel telephom in de central skies,
Luminate his brow wid de sun ob Heben,
Turpentine his 'magination,
Grease his lips wid possum oil,
Lectrify his brain wid de lightnin ob Dy word,
Put petual motion in his a'ms,
Fill him plum full wid de dynamite ob Dy glory,
Noint him all ober wid de kerosene ob Dy salvation,
And den, dear Lawd, set him on fire!"

If I could have all of those things happen to me at this time, I might be able to serve you during the coming year in a manner that you are entitled to. I would be less than frank with you if I did not say that I am thrilled to be President of this Association. That is a personal emotion that perhaps I can share with Sue, but it is a little difficult to share with a group. I do feel that all of us can be and should be thrilled by membership in the International Association of Insurance Counsel. Each of us should be exceedingly proud of the strength of this organization. I think we should be proud of the fact that the organization is composed of strong, outstanding lawyers in an important segment of one of the most responsible professions of the United States and Canada. I think we should be proud and thrilled by the fact that the dedicated service of a George Yancey and a Bill Knep-

per, together with the assistance of many other individuals, have developed over a period of years a professional JOURNAL which is recognized in our field of advocacy as the outstanding publication of its kind.

I think each of you, with me, should be thrilled by the fact that this Association has developed during the past year, with much background work, but has made finally effective during the past year through the untiring efforts of such as Stanley Morris, Lew Ryan and many others, The Defense Research Institute, which is providing the answer—a very necessary answer—from the standpoint of us who are defense lawyers, to those gimmicks which have infiltrated the practice of tort law during the past five to ten years. I am thrilled by what DRI has accomplished, and is accomplishing.

There is another thing about IAIC which thrills me, and I'll bet this touches a responsive chord with some of you too. We have all belonged to organizations of one kind or another during our professional lives, and were it not for the careful and intelligent planning that the predecessor officers of this organization have demonstrated, the International Association of Insurance Counsel would not be in the stable, responsible, financial position which it occupies, which is not characteristic of all organizations. And, too, and a factor related to our financial responsibilities perhaps, is our membership status. It has not been my privilege prior to membership in this group to belong to any organization where the applicants for membership exceed, as they do at this time, our ability to absorb new members, so we do not have to have financial campaigns nor do we conduct membership campaigns.

Most of all I am thrilled by and proud of, the people who belong to the International Association of Insurance Counsel. As many of you know, within the last sixty to ninety days there were sent to you committee preference sheets on which you were asked to indicate your preference as to work in the various fields of activity of the Association during the coming year. Of the 1800—approximately—such sheets as were sent out by Miss Dahinden's office, it was my guess in advance, when we planned this, that perhaps 200 or at a maximum 300 would respond; which is no reflection at all upon those who don't, but I thought that that would be a creditable number indicating a desire to participate in activities. It was absolutely incredible to me to receive over 600 responses to my request for your preferences for committee assignments.

What greater strength could there be in any organization than such a demonstration of the interest and the desire to participate than was shown by that particular incident recently? This leaves me to present to you what, for my purposes at this time, is my honor roll. I call it my honor roll —I refer to it that way because it represents those men whom I have asked to serve as chairmen or vice-chairmen of the standing committees of this organization during the coming year, and the gracious and willing response I got to such requests was a real thrill to an incoming President. I would like to read their names—those who are here I would appreciate having them stand—and when I have concluded reading the names I will ask you all to give them your expression of appreciation. Our Accident and Health Insurance Committee will be headed by Mr. James J. Langan of Jersey City, with Mr. Price H. Topping as vice-chairman.

Our Automobile Insurance Committee, the chairman is Mr. A. Lee Bradford of Miami, and the vice-chairman Jerry Hayes, of Milwaukee.

The Aviation Insurance Committee is headed by "Dick" Galiher of Washington, D.C., and his vice-chairman is David Dyer of Miami.

The Casualty Insurance Committee I guess is properly named because I suffered a casualty—you have just removed one of my chairmen and made him a member of the Executive Committee. . . Mr. Wally Sedgwick, was appointed chairman of the Casualty Insurance Committee for the coming year with Bill Cooney of Detroit as vice-chairman. Bill will serve as chairman and Alex Cheek, Oklahoma City, Oklahoma as vice-chairman.

Ernie Fields will serve as chairman of the Convention Site Committee, assisted by John Kluwin.

Charles E. Pledger, Jr., Washington, D. C., will be chairman of the Defense Research Committee assisted by Frank Van Orman of Newark.

The Federal Rules of Civil Procedure Committee is chairmanned during the coming year by Josh Groce of San Antonio, with Willis Smith, Jr. of Raleigh, North Carolina as vice-chairman.

Fidelity and Surety Insurance Committee —the chairman is Paul McNamara, with Bob Leake as vice-chairman.

Financial Responsibility Committee, the chairman is John Graham of Hartford, with Tom Curtin of Reading, Pa. vice-chairman.

Fire and Inland Marine Insurance Committee, the chairman is John Gorman of Chicago, with Newton Gresham of Houston, Texas, vice-chairman.

Home Office Counsel Committee, the chairman is Al DesChamps of San Francisco and Milt Baier of Buffalo as vice-chairman.

The JOURNAL Committee, Gordon Snow of Los Angeles continues as chairman, with Obie O'Bryan of Fort Lauderdale as vice-chairman.

The Life Insurance Committee is chairmanned by Rowland Long of Springfield, Mass. with Ed Post of New York vice-chairman.

Malpractice Insurance Committee: Pinkney Grissom of Dallas, Texas is our chairman and Bill Martin of New York City, is vice-chairman of that group.

Stan Long from my own home town is chairman of the Marine Insurance Committee, and Bill Porteous of New Orleans is vice-chairman.

Membership Eligibility—the chairman is Wayne Stichter and Sam Chilcote is vice-chairman.

The Memorial Committee: Bill Baylor of Lincoln, Nebraska is the chairman and Pat Eager of Jackson, Mississippi, vice-chairman.

Another casualty I suffered at the election this morning: Jim Allen was named as the chairman of the Nuclear Energy Committee. Instead, R. Crawford Morris, Cleveland, Ohio, is chairman and Dick Wagner of New York is vice-chairman.

A third casualty I suffered—my selections seemed to conform to your choices when it comes to election—Gordon Close was to have been chairman of the Practice and Procedure Committee. Instead, Edward J. Kelly, Des Moines, Iowa is chairman with Clarence Campbell of Seattle, vice-chairman.

The Senior Advisory Committee: Charlie Pledger is the chairman.

Workman's Compensation: the chairman is Bob Enteman of Newark, New Jersey, and Noel Symons of Buffalo is vice-chairman.

And also, although I have not appointed the convention committees for next year in most cases, I would like to announce that Frank O'Kelly of Florida will be chairman. and Percy McDonald, Jr., vice-chairman. Will you express to these men, with me, our appreciation.

I feel most deeply that the calibre of the men who have accepted these important assignments for the coming year is a much sounder guarantee to you of an effective program by your Association this year than anything I could say.

It is now my very happy privilege to present to you people whom you know. First, I know you all want to greet Lucille Knepper. Here is a lady whom all of us who have attended conventions over a period of some years have had an opportunity to know and, knowing her, all of us admire her. I was impressed by the particular enthusiasm which Charlie Pledger and Tiny Gooch seemed to reflect when they brought Ted Moody to the stand a few moments ago, and I wonder if you fellows will just carry on with that good work and bring Lucille?

I wish to present to you another lady, one who has established a record which I doubt can be equalled by anyone else in this room. For more than half of the years of her life she has attended conventions of the International Association of Insurance Counsel. Bonne Knepper is not quite fourteen years of age and I am informed that this is her seventh convention. Bonne Knepper, the daughter of your new President-Elect! Stand up, Bonne.

When one who has worked with Bill Knepper for as long as I have thinks of Bill, it is pretty hard not to talk in superlatives. I am going to avoid that, but I cannot help but tell you that when I think of Bill words such as industry, talent, dependability, willingness, versatility, crowd out other words of equal significance. I am sure it is a great satisfaction to all of us that Bill is chosen as President-Elect of this organization, and at this time I request our Past Presidents, Mr. Alvin Christovitch and Mr. Paul McGough, to escort Mr. Knepper to the head table.

Bill, there is some analogy between a wedding ceremony and what you are about to do. It is my privilege to ask you at this time for the coming year and for the year after that, as President, if you will forsake the practice of law, forsake Lucille and your family, and, forsake all others—holding yourself only for the work of the International Association of Insurance Counsel, and, it is my duty, too, to admonish you that you must speak now and, if not, forever after hold your peace.

MR. WILLIAM E. KNEPPER: Thank you Payne. I will buy all of it except forsaking those gals of mine, and that I won't do!

For just a moment let me say that I find both joy and sorrow in my heart right now. I am fully conscious of the high honor that you have conferred upon me; to me there is none higher. I am fully conscious of the tremendous responsibility that will be mine. I shall try to measure up to it. I am particularly happy to have the opportunity to work with Payne. He is one of my oldest friends in this Association. He and I were scarcely more than boys when we first met in these convention halls.

I would say to you, however, that there is a very definite wrench in making the break that has to be made because of this change of position. It is not going to be easy to say "goodbye" to the JOURNAL.

In 1955, when I succeeded George Yancey, I promised him that the JOURNAL would go forward and measure up to the standards that he had set for it. With the help of the Regional and State Editors and the others who have done that work, I think we have kept that promise, and George, if you are still in the room, I want to say to you right now that while I cease now to be its Editor, the JOURNAL staff, Bob Miller as the Managing Editor, and the new Editor who will step into a going concern, will keep that promise to you, too, in the future. I will do my best. Thanks a lot.

PRESIDENT KARR: I would like to say that although Bill may no longer be Editor of the JOURNAL, if he has any idea he is going to say "goodbye" to the JOURNAL, he is very much mistaken.

If there is no further business to come before this convention, may I now, with my very best wishes to all of you for the coming year, adjourn this meeting and express the hope that we will all get together one year from now, and it will be at White Sulphur Springs, West Virginia.

The Thirty-Fourth Annual Meeting of this Association is adjourned!

Open Forum

JACK HEBDON, *Chairman*
San Antonio, Texas

JOHN M. GOODWIN, *Vice-Chairman*
St. Louis, Missouri

American And Ontario Practice Compared In The Jury Trial Of Tort Actions

THOMAS N. PHELAN, Q. C.
Toronto, Ontario, Canada

THE convention program refers to a discussion of "American and Canadian Trial Systems Compared." I have taken the liberty of changing that to read, "American and Ontario Practice Compared in the Jury Trial of Tort Actions." There are reasons for the change. In Quebec the Code Napoleon is followed in civil matters. Ontario is the only province in which many tort actions are still tried with a jury. While the right to jury trial exists in the other provinces, the right is not exercised to the same extent. In Ontario about one-half of the tort actions are tried with a jury.

THOMAS N. PHELAN, *Q. C. is senior partner in the firm of Phelan, O'Brien, Phelan & Rutherford. He is a graduate of the University of Toronto (B.A. and LL.B., 1902) and Osgoode Law School (1905). He was appointed Queen's Counsel in 1920. A former vice-president and member of the Executive Committee of IAIC, Mr. Phelan belongs to the Canadian Bar Association and Psi Upsilon Fraternity.*

In Ontario how does a litigant proceed to have his action tried with a jury? There is no constitutional right to trial by a jury as there is in American states. In Ontario either party may serve a notice requiring the action to be tried with a jury. Upon interlocutory application any judge may strike out the jury notice if it appears to him that the action is one which ought to be tried without a jury. The trial judge has like jurisdiction. The practice is well established that the jury notice will be struck out in actions involving equitable issues, in actions of malpractice, in actions where the issues involve complicated points of law or expert, technical or scientific evidence and also in actions where the facts and the law are so involved that it would be difficult for a trial judge to adequately direct the jury.

There is a marked difference between the American and the Ontario practice in the challenges to a juror. In Ontario the want of qualification is always a ground for challenging a juror. Otherwise the plaintiff or plaintiffs on one side and the defendant or defendants on the other side may challenge peremptorily any four and not more of the jurors drawn to serve on the trial. Counsel does not have the right or opportunity to question a juror before exercising the right of challenge. Under the American practice the examination of prospective jurors may occupy days. In Ontario there is barely an interval of more than half-an-hour between the time the case is called and counsel makes the opening address to the jury.

The functions of a judge presiding at a jury trial in Ontario differ substantially from those of the judges in most of the American states. It seems to me that the judges have much wider duties and respon-

sibilities than those of the judges presiding in many of your states. One of our learned judges has said, "The function of a judge presiding at the trial of a jury action are not those of a judge sitting as an umpire to see that the prescribed rules are observed. His duties are to see that people who have resort to the courts are given their rights according to law not binding himself by any hard and fast rules which will prevent justice being done."

In directing the jury the Ontario judge necessarily explains the law and its application to the facts. He is at liberty to express his view about conflicting evidence and the credibility of witnesses, subject to a warning to the jury that the responsibility for the decision is theirs and they may disregard any views which he has expressed about the facts. The jurors are instructed, however, that they must accept as correct the law as the trial judge directs the relevant law to be. The functions of the jurors are strictly and definitely limited to the findings of fact relevant to the law as so directed by the trial judge. In that respect there is a marked difference between our practice and that which prevails in some of the American states.

The trial judge has the right which he usually exercises in tort cases of directing the jury to answer relevant written questions instead of returning a general verdict. These questions are usually framed with the assistance of counsel. The judge, however, has the sole authority of determining what questions are relevant and the words in which the questions are to be expressed. Where objection is taken in Ontario jury trials to any procedural matter or as to the admissibility of evidence the judge in most cases hears argument of counsel before making his decision. In important matters he expresses his reasons for his decision so that in case of appeal the validity of his reasons may be considered by the appellate court. In American trials which I have observed, such objections are not made on specific grounds but are made on general grounds formally stated.

It is the duty of the trial judge in Ontario in tort actions to say whether any facts have been established from which negligence "may be reasonably inferred." The jurors have to say whether from the facts as found by the jurors negligence "ought to be inferred." If the trial judge finds no facts from which negligence may be inferred, he will dismiss the plaintiff's action.

In some of the American states, according to my information, the jury's finding on the facts is absolutely final. In Ontario the appellate court has jurisdiction to grant a new trial for misdirection or for errors in procedure causing substantial adjustments. An appellate court may also, but rarely does, dismiss the action or grant a new trial if it finds the jury's verdict is perverse, and the appellate court has the same jurisdiction as the trial judge to dismiss the action if the court finds no evidence at all to support the jury's finding on a question of fact.

A few incidents which may be peculiar to our type of trial practice may be interesting. Each of you may make the contrast with the practice prevailing in his own state.

While in criminal cases the number of trial jurors remains at twelve, in civil cases the number is reduced to six and women are eligible for jury duty.

Demonstrative evidence is used to the extent that it may be strictly relevant. Judges do not encourage any extravagant use of this method. Blackboards are not used.

While reasonable latitude is allowed counsel in addressing the jury, inflammatory addresses are not permitted and may provide reason for the judge striking out the jury and proceeding with the trial as a non-jury action.

Where mention is made by one party of the opponent's insurance, the opponent has the right to a new trial before another jury.

Ontario practice permits payment into court before trial by the defendant of a sum in satisfaction of the plaintiff's claim. If the plaintiff fails to recover more at the trial, the plaintiff must pay the defendant's costs of the action and the surplus paid in is paid out to the defendant.

A motion for judgment after verdict is with rare exceptions a mere formality. The trial judge has no jurisdiction to grant a new trial, except as above-stated—he has power to grant a non-suit if he holds that there is no evidence at all to support a specific answer of the jury to the questions put to them.

Nowhere in Canada is the contingent fee practice recognized. In Ontario all costs are regulated by a tariff specifying costs for certain aspects of pre-trial and trial practice—e.g., so much is specified for the commencement of the action, so much for pleadings, interlocutory proceedings, counsel fees and so on. All solicitors' bills of costs are subject to taxation according to the tariff by a taxing officer who is an officer of the

court. To give you an example, an average jury action after a three-day trial with damages assessed at $5,000.00, whether judgment is for the plaintiff or for the defendant, will result in the successful party collecting from his opponent taxed costs of about $1,500.00.

Judges and counsel at trial wear robes but do not wear wigs as in England.

There are two matters of American practice which we do not have in Ontario, pretrial depositions from witnesses and pretrial hearings. There are two matters of Ontario law and practice which are not found in most of the American states; these are the comparative negligence law and the right of motor vehicle insurers to deny liability and at the same time to participate as third-parties in the defense of the plaintiff's action.

As to the first group, in many American states counsel for either party may take depositions from any witness before trial and the other counsel has a right to be present. According to Mr. Belli, who was recently in Toronto, litigants take full advantage of this practice and take depositions from almost every witness long before the trial. In Canada such depositions are never permitted, except the usual de bene esse examination of a witness who, on account of illness or absence from the country or for other good reason, is unable to attend at the trial.

Then in many of the states there is a formal pre-trial practice whereby the parties attend before a judge with a view to agreeing on some of the matters in dispute, discussing settlement values and attempting generally to dispose of the case without a trial. There is no such practice in Ontario. In Ontario there is provision for production of all relevant documents and of the parties only for discovery.

Finally, I make brief reference to our comparative negligence act and to the law which enables a motor vehicle insurer to deny liability and at the same time participate in the defense of the plaintiff's action.

What we call the Contributory Negligence Act is, as you well know, whether the the law is in effect in your state or not, a substitute for the common law rule which deprives the plaintiff of any recovery if at fault in the least degree. Under the Contributory Negligence Act the finding of the plaintiff's contributory negligence merely reduces the recovery. Under the old law, jurors were alive to the unfairness of the law and were prone to acquit the plaintiff of any fault contributing to the result. This resulted in a finding against the defendant to the extent of 100 percent.

The Contributory Negligence Act has been in force in Ontario since 1930 and I do not think there is in Ontario an insurance defense counsel or an insurance claimsman who would willingly see the Contributory Negligence Act abrogated.

Under our Insurance Act there is a provision that where an insurer under a motor vehicle liability policy denies liability, the insurer may be added as a third party to any action in which the insured is a party, whether the insured defends the action or not. The insurer as third-party may contest the liability of the plaintiff and the amount of damages claimed to the same extent as if it defended in the action. This practice has been used with definite advantage to the insurer, where there has arisen a question about the insurer's liability to the insured under the policy. Under this provision of the law, the insurer is made a third-party upon application to the court. In the settled form of order there is a provision that at the trial of such action no reference shall be made to the fact that the third party intervenes as an insurer.

A Federal Judge Looks At Liability Insurance*

JUDGE JOHN R. BROWN
Houston, Texas

I AM NOT quite sure just what this title is to suggest. Is the thing of interest what a Federal Judge looks like when he is looking at liability insurance? Or is it what liability insurance looks like to a Federal Judge when he looks at it? Or may it be a combination of both?

JUDGE JOHN R. BROWN, *a native of Nebraska, has an A.B. degree from the University of Nebraska and a J.D. and an LL.D. degree from the University of Michigan. He practiced law in Houston, Texas from 1932 to 1955 with the firm of Royston & Razor of which he was the senior active partner when appointed Circuit Court Judge of the United States Court of Appeals for the Fifth Circuit.*

WHY LOOK?

Perhaps an even more pointed question would be: what difference does it make—especially when the Federal Judge is on an Appellate Court and incapable of speaking authoritatively by himself? Behind this last query is the awesome fact that it really matters little either how the Judge looks or how he looks *at*. The important thing is what does he do, what does he decide? And that, in turn, is something upon which he is not, or at least ought not to be, free. For what he does, what he decides ought to be the law. And that *law*, no matter how difficult to locate or divine, is—or at least ought to be—something over and beyond the personal feelings of the Judge.

THE BOUND REPORTS BIND ME

But having established for myself at the outset this goal of objective idealism, I am the first to acknowledge that the law is no sterile force existing apart from, or uninfluenced by, the most human of personal impulses. Despite the fact that Judges so often apologize for this, there is not a single lawyer worth his salt who does not reckon with it in the most immediate terms. Indeed, the now time-honored practice of Judges writing opinions for a multi-judge court is a recognition that each, as a man and as a judge, is an individual personality with his own unique method and approach. And the experience of the bar bears wisdom to Job's outcry, Oh, "that mine adversary had written a book." Consequently, in my view it is no offense—certainly not an impeachable high crime and misdemeanor at any rate—to acknowledge that as I breathe and live and write as a Judge, I must have some sort of legal philosophy and I am probably incapable of concealing whatever it might be.

SAILOR BEWARE

That carries with it, however, its own death knell. In an expression I use, perhaps too frequently, this leads me to "sound a special caveat"[1] lest those who read equate what I say here either with what I will do, or hold, or say later, or, more important, with what a court of which I am a part will do, or say, or hold.[2] For in the final analysis my sworn duty is to try my very best to ascertain what it is the law compels and then, with fortitude, adhere to it.

THE JUDGE STANDS WHERE THE PARTIES STOOD

As a former dues-paying, card-carrying member of this organization, I claim a special kinship with its now distinguished members. I think my approach to liability insurance as a Judge is exactly what it was as a lawyer representing underwriters.[3] In-

* (Editor's Note: Judge Brown has requested that we state that this is the talk he meant to deliver in Montreal.)

[1] National Surety Corp. v. Wells, 287 F.2d 102 at 108, (5 Cir., 1961).

[2] As it is my "look" you have sought and, like Job, I must stand accountable for my published writings, I trust I will be forgiven for a too-liberal a use of opinions written by me. In Louisiana, which is in the Fifth Circuit, as the writing Judge, I would be called "the organ."

[3] As a lawyer I had the same approach when representing assureds. This was, of course, the living principle when, as I frequently did, I was engaged

deed, I believe that is the approach which the law says the law should take. Too often forgotten by those who seem to think that the principle applies only where a contract is ambiguous is the basic rule that every contract—certainly insurance contracts—is to be viewed from the standpoint of the parties. Our Court has expressed it in various ways. "A court called upon to determine the meaning of written contracts * * * looks primarily to the language of the contracts after *first placing itself* as nearly as possible in the position of the parties to them at the time of their execution."[4] (emphasis added)

I regard this as a very important thing. Of course, "Where the terms of a written contract are plain and unambiguous they alone are looked to to ascertain their meaning."[5] But in today's litigation the problem is seldom that simple. And it is because the words of the contract are not plain that the business of judging takes place. In that situation the position of the parties at the time the policy was sought and obtained is of dominant significance.

Risky Business Brings The Business

What lawyers in their proper zeal to win the specific case too often overlook is the prime factor that first brought the policyholder and the insurer together. That was the existence of a real business or personal hazard and the desire to obtain complete or limited protection by the payment of a fee to one willing to underwrite it. In assaying what was actually procured I think the place to start in these doubtful situations is to match the contract, provision by provision, clause by clause, indorsement by indorsement against each of these known hazards. Sometimes it will be found that the realization did not come up to the expectations. But that cannot exist too often if the industry is to prosper. For I think the insurance fraternity would agree with me that experience proves that "insurance as a subject of sale and service finds its business acceptability, indeed its economic existence, in the response made to the business demands and necessities of the business world."[6]

More than that, newer and better and broader coverages are not alone the response to business needs. Frequently they are the response to business needs that have been thwarted by adverse court decisions which may have given a momentary victory to an underwriter, but which nonetheless left his potential customers unsatisfied in an imperative demand. Nowhere is this more true than in my old field of admiralty. Of the Inchmaree Clause,[7] rejecting an effort to narrow its application, I had this to say: "But this is to read that Clause as a restriction of coverage and to ignore its rich history which reveals it and its several expansive amendments as the underwriters' response to the practical business needs of the shipping world in the face of adverse court decisions. As such, its purpose is to broaden, not restrict, to expand, not withdraw, coverage."[8]

The Risk-Taker Has Risks Too

Of course to put oneself in the position of the underwriter and the assured as they face each other is a two-way street. For just as the policyholder assuredly needs protection against imminent risks, so does experience frequently demonstrate that the underwriter needs to have clear limitations, restrictions, or occasionally exclusions from some specified perils. But in each case I think the underwriter faced with the problem, and a court faced with the problem when the underwriter is unwilling to face up to it wholly on his own, comes closest to the real intent of the parties when it looks at it in the light of these things—the real, foreseeable risks and hazards—which were troubling the two and which brought them together

[4]Fidelity-Phenix Fire Ins. Co. v. Farm Air Service, Inc., 255 F.2d 658 at 660, (5 Cir., 1958); Indemnity Ins. Co. of North America v. duPont, ...F.2d...., (5 Cir., 1961), [July 19, 1961, No. 18400]; U. S. Industries, Inc. v. Camco, Inc., 277 F.2d 292 at 295-96, n. 14, (5 Cir., 1960).

[5]Indemnity Ins. Co. of North America v. duPont, ...F.2d...., (5 Cir., 1961), [July 19, 1961, No. 18400]; see also Canal Ins. Co. v. Dougherty, 247 F.2d 508 at 512, (5 Cir., 1957).

for owners or underwriters (or both) in laying out complex, integrated insurance programs especially in ambiguous-amphibious offshore oil operations. I discussed this at the University of Texas Institute on Offshore Drilling Operations, December 1959, Integration of Insurance in Offshore Operations, and at Tulane University, Planning Insurance Coverage of Tidelands Operations, Minerals and Tidelands Law, Tulane University, November 1959.

[6]Jewelers Mutual Ins. Co. v. Balogh, 272 F.2d 889 at 892, (5 Cir., 1959).

[7]See Inchmaree Revisited by John M. Aherne, Section of Insurance Negligence and Compensation Law Proceedings, 1957, p. 222, ABA.

[8]Saskatchewan Government Ins. Office v. Spot Pack, 242 F.2d 385 at 391, (5 Cir., 1957), 1957 AMC 655; see also Tropical Marine Products Co. v. Birmingham Fire Ins. Co., 247 F.2d 116, (5 Cir., 1957), 1957 AMC 1946.

in the first place. This is not the approach to soak the insurance company because it is one. I regard this as a truly businessman's point of view. Insurance is a very practical matter. It is an absolute business necessity. And "* * * for businessmen, if not for the general public, business and law have long abandoned the naive idea that the payment of losses are 'free' to the assured" since business men realize that insurance "payments must ultimately come from somewhere, and it is the fact of business life that claims paid will, as they must, someday come from the assured's pocket."[9]

The Still (?) Small (?) Voice Of Dissent

It was just such factors which led me to dissent in *Navigazione Alta Italia v. Columbia Casualty Co.*, 256 F.2d 26 at 29-34, (5 Cir., 1958), 1958 AMC 1099. There a most extraordinary policy was written for a stevedoring company in Mobile extending protection to the unknown, unspecified and the unascertainable owners, operators and charterers of vessels for which, at some unknown time during the policy term, the named assured might do work as a contracting stevedore. I viewed it from the standpoint of the water bound businessman plagued as he now is by a "contemporary climate in which a simple injury to a longshoreman aboard a vessel rings the curtain call for a threering Donnybrook * * * in which longshoremen pursue shipowner who pursue stevedore who may implead a common Insurer * * *." 256 F.2d 26 at 33. I thought that the vessel owner ought to have the benefit of the policy purposefully procured for him by his stevedoring contractor so that the adequacy of notice of claim, injury and suit should be determined as of the time the owner first learned of the existence of the policy. It was just too bad, I contended, that this was after the horse was out of the barn—indeed after the barn was burned down—and the damage case had already been tried and lost. I supposed I had some respectable authority in my support. At least my references to Appleman's treatment of the situation of notice by omnibus insureds and which I thought was a "parallel analogy"[10] established this to my satisfaction just as it later did the Court in *National Surety Corp v. Wells*, 287 F.2d 102, (5 Cir., 1961).

Look Long And Longingly

But it is not enough that the policy be looked at in terms of the parties as they faced each other at the time of its procurement. I consider that the insurer has the obligation of continuing to look at his assured as a very important person. That means that he is not to dump either his assured or his assured's interest on the discovery of a fortuitous adversary. You are all acquainted with the familiar pattern. We see it most in automobile insurance situations. I have described it variously in these ways:

> On facts, strikingly simple, neither complex nor conflicting, we have again the problem of an Insurer who has written a policy and taken the Assured's premium urging him to go elsewhere, tentatively if not finally, because another insurer is, or ought to, or may be, liable for the whole, half, or part a loaf. In the process the moving Insurer generally garbs itself in the appealing robes of some assured so that, casting itself in a strange role, it asserts what it so often denied that the policy should be liberally construed and, by a bare toe hold manages to make itself enough of a party to force a construction of another contract made by another insurer with another assured and which, under no circumstances, was made for its beneffit * * *. So it is here. Coming as it does the accident and the assureds seem all but forgotten as the two Insurers match clause against clause, coverage against exclusion, claim against denial, in this battle between fortuitous adversaries.[11]

This is another of the increasing flood of cases in which liability insurers seek to escape judgment by claiming that another should bear the load. This frequently puts the assured, who through unusual prudence obtains two or more coverages, between the upper and the nether millstone and, in the place of the feeling of assurance (single or double) he finds himself facing not only the damage claimant with prospects of high judgment and cost,

[9] American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co., 248 F.2d 509 at 516, (5 Cir., 1957).

[10] Of this my critics (and warm friends), Risjord and Austin, in their write-up, case No. 1591, AUTOMOBILE LIABILITY INSURANCE CASES, remarked: "We believe that this parallel is a trifle perpendicular."

[11] American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co., 248 F.2d 509 at 510-11, (5 Cir., 1957).

but a two, three or four-cornered free-for-all with as many underwriters whose only point of unanimity is: this policy doesn't apply *because* another (always a different company) does. This casts the insurers in strange and unique roles—echoing, for example, the refrain so often heard against them, that the policy, if ambiguous or of doubtful meaning, must be most liberally construed in favor of the assured. And, then, almost invariably, through the plea of subrogation, omnibus extensions or other accessible legal fictions, they then take upon themselves the garb of the assured, the injured party, or at least someone with an inviting equitable appeal.[12]

The Forgotten Man

This is more than a provocation for rhetorical orbitting. The troublesome thing to me is that the forgotten man is the principal character of the play. The forgotten man is the man without whom the whole business fails, upon whose payments depend the prospect of a profit, whose need gave rise to the existence of insurance at all, and whose welfare would normally be the prime solicitude of the underwriter—the little lone assured.

Too often, it seems to me, this multi-cornered impleader of the unknown heirs of the unknown underwriters of the unknown assureds is more than a quest for some sort of land-based General Average in which to palm off part, or all, of a loss onto another. If it were but a contest between two or more such parties, it would be a simple workaday problem on who was right. Unfortunately, too often, as I see it, this search for another solvent party to share all or part of the burden inevitably leads to an abandonment of the assured whose interests should be the essential concern of the underwriter. Where the underwriter bound itself both to protect and defend it too often puts the assured in the position where both are denied and he is forced to join the affray to seek it from others or, worse, from the very insurer who bound itself to him. I have described this process in this way:

> This is another, and undoubtedly not the last, of those cases of which we have many, in which one insurer having the good fortune to find some other insurer who has written a policy for someone else attempts to engraft itself upon the contract to which it was not a party in the hopes that what it bound itself to do, it need not perform. The result, if successful, is that its contractee, the assured, must look elsewhere for the promised protection.[13]

After describing the relation of the parties including Clay, the assured, and American, Clay's insurer, I went on:

> But the parties had scarcely begun to litigate. Now to that relatively simple tort claim which long ago could have been tried, settled or disposed of, comes action which turned this into a many-sided Donnybrook. For American, defending Clay and supplying it legal counsel in resisting the suits by the Damage Plaintiffs, now turned on its assured and filed this action for declaratory judgment. In it American sued everybody. It sued its own assured Clay. Likewise it sued Britt and Pennsylvania and all of the Damage Plaintiffs.
>
> The refrain of American's complaint was the familiar one: Clay does not have the protection which it thought it bought and paid for, but Clay need not worry since Britt was thoughtful enough to procure insurance and Pennsylvania would take care of Clay as well. The only thing wrong with this was that Pennsylvania agreed only part way—it agreed with Clay that American owed Clay a defense. But it disagreed that Pennsylvania ever would. Clay, the sole victim of these magnanimous assurances, stood alone and helpless in the middle, and had to retain counsel

[12] Maryland Casualty Co. v. Southern Farm Bureau Casualty Ins. Co., 235 F.2d 679 at 680, (5 Cir., 1956).

Somewhat similar comments have been made in United Services Automobile Association v. Russom, 241 F.2d 296 at 297, (5 Cir., 1957). The insurer "* * * falls back on fluid defenses the effect of which is to say that it is not liable because *another* is, or partially is." Likewise in General Insurance Co. v. Western Fire & Casualty Co., 241 F.2d 289 at 290, (5 Cir., 1957): "Here, as now elsewhere so common * * * the traffic accident has become a mere incident to the vigorous battle between insurers, each of whom by a full use of fluid inconsistent defenses reminiscent of common law pleading disclaim all liability but then assert that another, not it, is liable. * * *. In that struggle, substituted for the forgotten circumstances of the occurrence are the collateral controversies, removed in time and distance, relating to the issuance of the policies, conduct and action of the assureds, underwriters, agents, application and construction of abstruse policy clauses, and the like."

[13] American Fidelity & Casualty Co. v. Pennsylvania Threshermen & Farmers' Mutual Casualty Ins. Co., 280 F.2d 453 at 455, (5 Cir., 1960).

for the preservation of its rights. Catching the spirit of this Kilkenny Fair in which all lash out against one another, it is not surprising that Clay's private counsel, nominally an appellee, now takes on the role of partial ally of American to urge that coverage of Pennsylvania, as well as American, attaches to increase Clay's Coverage A protection limits * * *. 280 F.2d 453 at 455-56.

Forgetting The Marriage Vows To Love, Honor And Defend

What seems to be entirely forgotten in this process of escaping or sharing the ultimate financial burden of the claim is the serious obligation taken on by the underwriter to provide a good, competent, faithful defense to its assured. I phrased it this way:

> To provide in the policy that the dollar amount of the loss ultimately payable may turn on the availability of other *valid* and *collectible* insurance is one thing. Apart from these vexations complications which leave the assured so long uncertain —if not uninsured—the assured does not suffer from such provisions since the underwriter is released only by the collectibility of the loss from another source. This relates to money only, and then only to the extent that it is available elsewhere. But it is quite a different matter—in the absence of clear language compelling such a result—to construe the policy to allow the insurer to step aside and abdicate its important role of defender and thereby impose upon its assured a company unknown and unrelated to the assured. The financial responsibility, the business and moral integrity and reputation of the insurer, the practices followed by it in the defense of claims, the kind and reliability of the counsel it employs or who will work for it—all these and many others are factors relevant to the conscious choice made by the assured as it selects the company with which it will deal. Such matters are of great importance and can affect both the reputation of a business and its pocketbook. An assured entrusts much to the insurer when it commits the defense of claims to counsel selected by the underwriter. It is scarcely reasonable to think that responsible business men would leave the ultimate selection of the ultimate counsel to the fortuitous availability of a contract made between another insurer and some other person. Even more foolhardy would it be to leave to such unknown and unascertainable counsel the delicate decisions to try, or not to try, to settle or not to settle, as they might bear on the good will of the business or its bank account.[14]

Roast Your Own Chestnuts

Moving on to a new field I also think, especially in the area of coverage and exclusion, that too often courts are called upon to pull the underwriter's chestnuts out of the fire. Of course, where there is uncertainty or ambiguity—whether it is from sloppy draftsmanship or what—it is the duty of courts to be available to resolve as best they can that sort of controversy. And no one is to be criticized for resorting to such litigation. But too often, it seems to me, the litigation is merely to pull the insurer's chestnuts out of the fire when the chestnuts are his alone and a moment's reflection would show that it is a chestnut and a well defined one. A spectacular example in this category is the Omnibus Clause in the usual automobile policy. I suggest you look at it now. Read it again

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[14] 280 F.2d 453 at 460. To that I appended my footnote 12 which brought the matter from outer space to earthbound realism in understandable terms. "Today's spectacular verdicts makes the possibility of a recovery by damage claimants substantially in excess of policy limits something much more than an academic fear. When that happens there is little comfort in a possible recovery of the excess by the assured from the insurer. Whether the standard is negligence or good faith in the conduct of defense including settlement * * * the assured at best has a second lawsuit with the hope of recovery, and at worst the loss of this one too. This imminent likelihood demonstrates that the assured commits much to the reliability and judgment of the insurer."

In another case where an underwriter first unsuccessfully asserted that there was no coverage under the Omnibus Clause and then contended that in no event could it be liable since the agreed judgment settlement had been made without its prior approval, we concluded that the assured was then entitled to act as a prudent uninsured person. "And this seems a wise and fair result. For the contrary would mean that, to protect the defaulting insurer against improvident settlements not controlled by it, the assured, left in lonely isolation facing the damage claimants, would have to expose his whole fortune to the risk of exorbitant jury verdicts with only the hope that some Court in some state would sometime hold * * * that some insurer was liable." United Services Automobile Association v. Russom, 241 F.2d 296 at 301 and note 10, 5 Cir., 1957. See also Hartford Mutual Ins. Co. v. Gorbet, 241 F.2d 363 at 366, (5 Cir., 1957), note 6.

and then sit down and write out its limits. Of it I once said: "A fact some underwriters are reluctant to appreciate is that, by the Omnibus Clause, the insurer has committed to the named assured a wide capacity to determine to whom and under what circumstances coverage will be extended. Uncertainty, on the proofs, as to whether the assured has impliedly given his consent to the particular use does not weaken the decisive effect of it once that fact has been judicially determined.[15]

In the context of a case holding that a minor omnibus assured complies with the policy provision by giving notice immediately after he learns for the first time that he is an assured under his father's policy, I phrased it this way in rejecting the underwriter's contention that this was letting down the bars:

> We regard these circumstances as decisively significant in determining whether, as Texas defines "immediate", the forwarding of process by this young lad was within a reasonable time. Few boys have heard of omnibus, and if they have it undoubtedly means something other than insurance. Rare will be the high school boy who will have read, or reading will have understood, the sometimes weird language of an insurance policy. The law as an unavoidable necessity for effectual enforcement of contracts, may have to attribute knowledge of contents (and the duties spelled out thereby) to the parties to a contract. But it is carrying fiction to outer space to charge one who merely knows that another has a contract with constructive knowledge that such contract was made for his benefit as well if—and the if is a big one—a certain occurrence takes place under certain conditions. It becomes only more unrealistic when in this process, upon that constructive knowledge, the sometime-maybe-third-party-beneficiary is thereby subjected to the unknown duties and obligations to make some sort of report or forward some sort or some kinds of papers to some company whose name and address is unknown.
>
> * * * The law does not, as the Insurer fears, therefore let down the bars. The law takes the contract as insurers have drawn it—a coverage extended to times, places and persons unknown or yet unborn—and applies to it a rule of reason that when persons not parties reasonably learn that they are benefited subject to certain conditions, they must then, but not before, perform them.[16]

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[15]United Services Automobile Association v. Russom, 241 F.2d 296 at 300, (5 Cir., 1957).

[16]National Surety Corp. v. Wells, 287 F.2d 102 at 107, 108, 5 Cir., 1961.

Nothing has convinced me that my dissent in Navigazione Alta Italia v. Columbia Cas. Co., 256 F. 2d 26 at 29, 5 Cir., 1958, 1958 AMC 1099, was wrong. With the underwriter "going into this arrangement with its eyes (and perhaps its head) wide open * * *," I stressed why the insurer must have known it was taking on limitless, awesome obligations.

"When the Insurer issued this policy it is bound to have known that it was taking on awesome obligations. For the effect of this revolutionary coverage was to lift from the overburdened shoulders of the shipowner the portentous limitless and virtually absolute liabilities following in the wake of Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698, and place them in the willing hands of the Insurer as its new and assumed obligation. It knew, for example, that it was insuring the absolute warranty of seaworthiness of any and all vessels, no matter what their age, classification, flag, ownership, state of fitness, maintenance, upkeep or repair, with the sole underwriting criteria being that the ship was to be loaded or discharged by Walsh. * * * It knew as well that under the new and extended doctrine of vicarious seaworthiness it was insuring on behalf of these unknown shipowners and their *sea* or *un*seaworthy vessels the absolute fitness of any and all transitory gear and equipment which Walsh, the contracting stevedore, might bring aboard for the performance of its contract. * * *.

"Moreover, since Walsh was also a named Insured, it knew that if its additional Assured (the shipowner) were held to any one of these numerous absolute liabilities for anything done or not done by either shipowner, stevedore or both to the detriment or harm of a longshoreman, it could not, as other shipowners had done, or attempted to do, * * * palm off all or a part of it onto the party really at fault—the stevedoring company.

"Not only did it voluntarily take on obligations of an absolute character arising out of operations over which it would have no safety control occurring on vessels beyond its right of survey, approval or acceptance, but it had to recognize that these liabilities could be asserted all over the world whenever and wherever the ship or shipowner could be found with no way of even prophesying when the claims would be barred by statutes of limitations, either of the forum or of Alabama, or would become stale under the more elastic notion of laches in libels either *in rem* or *in personam* field in admiralty * * *

"When this Underwriter, for any and all shipowners and vessels who would come into the relationship with Walsh Stevedoring Company acting as independent contractor, took upon itself the far-reaching obligations of this contract to cover the extraordinary and limitless liabilities of such unknown parties which could be asserted by unknown people beyond the control of any and at unpredictable times and places, it is, at least on the basis of the mere pleadings, bound to have realized that its assured might not know of the existence of the policy and the duty of notification until long after the events involved."

Let The Sire Bear The Burden

When it comes to dealing with the other phase of this problem—uncertainty or ambiguity—my lament is not that Judges are required to expend their labor and time in resolving controversies growing out of poor draftsmanship. That is what Judges are for. We are bound to do it by our oaths and we ought to do it willingly. My reaction rather is that when the problem has been created by sloppy, careless draftsmanship by the only party—the underwriter—having anything to do with the preparation of the policy contract, the courts ought not to be blamed if the result seems bad or the coverage too broad, or the defenses too restricted. That is just the pigeons coming home to roost:

I am not the first Federal Judge to deplore what may be loosely called loose draftsmanship of l o o s e policies. Judge Learned Hand did it long ago as to marine covers[17] and Judge Schnackenberg of the Seventh Circuit did it more recently in a general liability cover.[18] And, of course, I always think of Judge Carter's quaint description of the Inchmaree Clause. "The marine insurance policy sued upon, is, like woman, 'fearfully and wondrously wrought.' It consists of nine additions or endorsements fastened to the top of a one-page marine policy. This policy is written in the archaic language of marine policies, similar to that referred to by the Supreme Court in the case of *Calmar S. S. Co. v. Scott*, 1953, 345 U.S. 427, at page 432, 73 S.Ct. 739, at page 742, 97 L.Ed. 1125, where the court said, 'Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts. * * *.' "[19]

Courts are going to do the best they can with materials, but with so much uncertainty[20] if the judicial product is unsatisfactory, the blame in most cases is not, in my judgment, ours. Our Court has pointed out: "But this predicament is not a creature of the law. It is the result of the underwriter's

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[17]Judge Learned Hand in Schmutz v. Employees' Fire Ins. Co., 76 F.2d 119 at 122, (2 Cir., 1935), 1935 AMC 1067 at 1072, had this to say: "The underwriter must mear such ambiguities, if they are ambiguities at all. Especially is this true of a policy made up like this one, by the incorporation of another policy drawn for a quite different kind of insurance. It is idle, we know, to protest against the shiftless composition of marine policies as they issue in this port; the underwriters prefer them so and the owners and shippers are either helpless, or indifferent, or both. The amorphous result which so often confuses parties and courts and breeds litigation will no doubt persist, and we must struggle as we can to impose coherence upon conglomerate jargon irresponsibly put together at random. But we may and should insist upon the most unsparing use of the canon contra proferentem; that is, upon the underwriter's disclosing a plain path out of a jungle he has made."

[18]In Ocean Accident & Guarantee Corp. v. Aconomy Erectors, Inc., 224 F.2d 242 at 247, (7 Cir., 1955), Judge Schnackenberg stated:

"The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no mean proportions. Starting out with three printed pages, the first of which consists largely of a form which is filled in on a typewriter, the reader is confronted also with six physically attached supplements, or riders, inconveniently assorted into different sizes. If he is possessed of reasonable physical dexterity, coupled with average mental capacity, he may then attempt to integrate and harmonize the dubious meanings to be found in this not inconsiderable package. A confused attempt to set forth an insuring agreement is later assailed by such a bewildering array of exclusions, definitions and conditions, that the result is confounding almost to the point of unintelligibleness."

In my paper at the Institute on Offshore Drilling Operations, University of Texas, December 1957, Integration of Insurance in Offshore Operations, I had shared Judge Schnackenberg's wisdom with my listeners.

[19]Ferrante v. Detroit Fire & Marine Ins. Co., 125 F.Supp. 621 at 623, (S.D. Calif., 1954), 1954 AMC 2026.

Another hoary clause now in its fourth century and traced back to the "Tiger" policy in 1613 A.D. is the "Sue and Labor" Clause with which I had to deal in Reliance Ins. Co. v. The Yacht Escapade, 280 F.2d 482 at 488, (5 Cir., 1960), n. 11.

[20]Not the least of our difficulties, especially in the Federal Courts, is the *Erie* rule properly confining us to the local state law. Honest candor compels us to acknowledge the accuracy of Judge Friendly's comment. "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Nolan v. Transocean Air Lines, 276 F.2d 280 at 281, (2 Cir., 1960).

The matter becomes only more complicated as the parties, the underwriters, the litigation, and the aftermath of it go from state to state, a process I once described: "In the course of its defenses, United takes us on a spirited, nationwide juridical conflicts bus ride as it proceeds from Ohio to Texas, Texas to Ohio, to Kentucky, and back to Ohio stopping en route only long enough to take on, as passengers, favorable local jurisprudence but departing quickly lest unfavorable and unwanted principles might come aboard." United Services Automobile Association v. Russom, 241 F.2d 296 at 298, (5 Cir., 1957). And it was just such an *Erie* problem which precipitated the good natured chiding I received in this Journal at the hands of Risjord and Austin in "Who Is 'The Insured' " Revisited, 28 Ins. Counsel J. 100 at pages 103, 108 and interstitally whenever and wherever those distinguished authors revealed the allergical rash to the "unfortunate" and "incorrect" effort of mine in American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co., 248 F.2d 509, (5 Cir., 1957).

own handiwork, subjecting it to all of the uncertainties inherent in such a process of policy 'draftsmanship.' "[21]

The Words Do Count

Now finally, as in the legalism of the call notes of a deed, we come back to the place of beginning. Throughout it all, the problem is one of interpreting, applying and construing a contract or what is thought to be a contract. I once put it: "We start with the proposition that our function is not to write insurance contracts. We are not underwriters. We must apply them as written by the parties * * * even though the result compelled by the plain words used may appear or be thought to appear to be unreasonable, unduly harsh, or stringent. We cannot ignore them. We cannot substitute others for them. So at the start we must ascertain whether the words used really leave a doubt or create uncertainty which needs construction. If not, the words control."[22]

Underwriting Is Not For The Birds — Or Judges

A major consequence of this indispensable approach is that underwriting is for underwriters. In another case I had earlier said: "Obviously use of a truck for general hauling for a commercial manufacturing concern is, or may be, much different from a rural, farm, plantation operation. At least that is to be assayed by underwriters whether they sit at Lloyd's Coffee House or at the office of Southern Farm Bureau in Jackson, Mississippi."[23]

Of course this is the balanced application of the principle I first emphasized—the court trying to put itself in the position of the parties at the time the contract was made. In this approach the court must be certain that it views not alone the needs of the businessman assured, but those factors which have a relevant, substantial interest to the underwriter as well. Just as it is not for the court to rescue an underwriter from the consequences of broad coverage which it perhaps foolishly extended, neither is it right for a court to write its own policy for an assured where the result of the circumstances is "to change altogether the whole character of the risks which were underwritten." When that happens the coverage should not be available. "With these major changes between the nature of the exposure undertaken and that which the Assured's voluntary conduct precipitated, it will not do for the Assured to say that with respect to this loss these admitted violations or actions were of no consequence. To do so would * * * amount to allowing Judge or Jury, unaffected by the painful prospect of paying a claim, to determine what factors are or are not of relative importance in evaluating a risk either for the scope of the protection afforded, the nature of protective limitations required, or the cost in terms of premiums."[24]

Holding The Assureds' Feet To The Same Fire

This approach also means that where duties are imposed upon the assured or those having the benefit of the contract, the underwriter is entitled to expect performance. And the courts ought not to shirk in giving effectual enforcement to them. Of prime importance in this category of policy conditions is the duty to give reasonably prompt notice both of an occurrence giving rise to a claim or liability and the commencement of litigation. Indeed, it is because an underwriter owes so much in the form of fundamental obligations to its assured that the underwriter is entitled to, and must, depend on complete, prompt and faithful cooperation. In a case holding that the assured had not given adequate and timely notice, articulating "what the Texas Courts have so often said" that "prompt notice of an accident is a reasonable requirement," I added these comments:

> Insurance companies under the pressure both of traditional schemes of statutory penalties and the general adverse psychological climate in litigation are expected to perform fully and quickly. To enable them to fill the law's demands, they must have notice of occurrences likely to give rise to claims under the policy. Prompt and thorough investigation by competent, trained persons is essential. The longer it is postponed the greater the likelihood of the loss of valuable information or available evidence. And since a liability policy, as does this one, provides *defense* as well as indemnity, which

[21] Nardelli v. Stuyvesant Ins. Co. of New York, 269 F.2d 592 at 594, (5 Cir., 1959), on rehearing of 258 F.2d 718, 1958 AMC 2404.

[22] Canal Ins. Co. v. Dougherty, 247 F.2d 508 at 512, (5 Cir., 1957).

[23] Maryland Casualty Co. v. Southern Farm Bureau Casualty Ins. Co., 235 F.2d 679 at 683, (5 Cir., 1956).

[24] Lineas Aereas Colombianas Expresas v. Travelers Fire Ins. Co., 257 F.2d 150 at 154, (5 Cir., 1958).

in turn requires the exercise of due care or good faith in the settlement of claims within the monetary policy limits, the Insurer, for the protection of itself against future "excess" claims and for the protection of the Assured against risks inherent in the necessity of obtaining full protection through any such uncertain claims, is entitled to the earliest practicable knowledge of the case.[25]

[25]Yorkshire Indemnity Co. v. Roosth & Genecov Production Co., 252 F.2d 650 at 656-57, (5 Cir., 1958).

This problem was also involved in National Surety Corp. v. Wells, 287 F.2d 102, (5 Cir., 1961). And it was differences over whether a third party beneficiary assured could reasonably give notice to an underwriter of an occurrence when he neither knew of the underwriter nor the policy in his behalf that led me to dissent somewhat extensively in Navigazione Alta Italia v. Columbia Casualty Co., 256 F.2d 26 at 29-34, (5 Cir., 1958), 1958 AMC 1099.

Land Ho! The End In Sight

I firmly believe, and I firmly believe that the law permits me to firmly believe, that most cases will solve themselves with no violence to the written words if a serious effort is made to view the undertaking and the words employed in the light of the conditions which the assured and the underwriter faced. If one sees a thread in my judicial philosophy that, I suppose, would be it.

To that would likely be added: when I look, I look long and longingly, but I write even longer.

Current Trends In The Products Liability Field

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IN 1931 Justice Cardozo made his now famous statement regarding products liability: "The assault upon the citadel of privity is proceeding in these days apace."[1] Thirty years later, to put it mildly, that statement is still true. As defenders of that citadel we may well ask ourselves—How goes the battle? Whither are we going? How are we doing? What should we do? What can we do? Will we do it? What about the opposing forces? What are their objectives? What are they doing? How are they doing?

William M. Prosser, Dean, School of Law, University of California, recently wrote:

> One major bastion, that of negligence liability, has been carried long since, and its guns turned inward upon the defenders. Another, that of the strict liability of the seller of food and drink, is hard pressed and sore beset, and may even now be tottering to its fall. Elsewhere along the battlements there have been minor breaches made, but the defense is yet stout. War correspondents with the beleaguering army are issuing daily bulletins, proclaiming that the siege is all but over. From within the walls comes the cry, not so; we have but begun to fight. Watchman, what of the night?[2]

In the next few minutes I intend to discuss some of these questions with you and suggest some possible answers for your consideration.

OBJECTIVE OF PLAINTIFFS' BAR

Simply put, the main objective of our adversaries is to mould the law so that any person injured as the result of the use of any product of any manufacturer or supplier can collect substantial money damages —regardless of fault by the manufacturer— regardless of the cause of the condition causing injury—regardless of the foreseeability of the cause of injury—regardless of the nature of the defect in the product, if any, and regardless of any contributory negligence on the part of the person injured. In short, absolute liability on the part of the manufacturer or supplier to any person injured by the use of the product. Fantastic? Unrealistic? Not so. The campaign is well under way, guided by skilled and forceful campaigners who have already made substantial advances along the road toward the ultimate objective.

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For example, the concurring opinion of Justice Traynor of California in *Escola v. Coca Cola Bottling Co.*, stated:

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a

[1] Ultramares Corp. v. Touche, 174 N.E. 441 (1931).
[2] 69 YALE L. JO. 1099 (June, 1960).

> constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[3]

The vehicle or device adopted by plaintiffs to attempt to bring about this happy state of affairs for them is the doctrine of warranty, either express warranty or the implied warranties of merchantability or fitness for use or purpose.

The campaign of the plaintiff's bar to enlarge and expand the area of products liability is getting startling results, both legally and economically, and constitutes a real challenge to all concerned with the defense and proper disposition of products liability cases. Periodicals and journals frequently reflecting the opinions of the plaintiff's bar openly advocate the proposition that the products liability field is the most active and most fruitful field of litigation in the country today. This attitude recently received widespread publicity in the Wall Street Journal which carried a long and rather comprehensive article on this subject. It recited that NACCA had set up and is operating a products liability exchange, through which members may obtain information and aid in preparation of products cases. It also stated that there had been 10,000 product liability suits filed in a one-year period, and in general citing significant cases and trends and pointing out the increasing importance of product liability to business and industry.

Products Liability Coverage

In order for any question of products liability to arise there must be a sale of a product. To be of interest to us, in most cases, there must also be an anticipated claim under some form of insurance policy extending products liability coverage. Unfortunately, most products liability policies are not simply worded documents. Merely to read it is no small task, and as for understanding it, let me quote the words of a federal appellate court on the subject:

> The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no mean proportions. Starting out with three printed pages, the first of which consists largely of a form which is filled in on a typewriter, the reader is confronted also with six physically attached supplements, all riders, inconveniently assorted into different sizes. If he is possessed of reasonable physical dexterity, coupled with average mental capacity, he may then attempt to integrate and harmonize the dubious meanings to be found in this not inconsiderable package. A confused attempt to set forth an insurance agreement is later assailed by such a bewildering array of exclusions, definitions and conditions, that the result is confounding almost to the point of unintelligibleness. To describe the policy as ambiguous is a substantial understatement. . . Guided by these rules, it might reasonably be claimed that there emerges through the confusing language and the shapeless masses of words before us, an intention to protect the insured from the commonplace risks incidental to the business of a construction contractor. . . .[4]

After a quick glance through this model of literary clarity and brevity, let us accept or assume coverage and turn to the question of possible defenses.

Theories Of Liability

In a products case there are three broad theories of liability which may form the basis of a cause of action: (1) Negligence. (2) Deceit or false representation. (3) Warranty, either express or implied.

Experienced plaintiffs' attorneys are rapidly learning to avoid using the negligence theory whenever possible because it is often difficult to prove negligence in a products case even with the help of *res ipsa loquitur*, which is nearly always available. This is one reason why the breach of warranty theory is being used more and more as plaintiffs' lawyers become familiar with the advantages and possibilities under this form of action.

The cause of action based on deceit or false representation is in many respects very similar to an action upon an express warranty. It has two principal elements which must be proved: (1) An actual misrepresentation of fact, and (2) such misrepresentation is made knowingly or with a reckless disregard of the truth.[5]

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[3]24 Cal.2d 453, 150 P.2d 436.

[4]Ocean Accident & Guaranty Corp. v. Aconomy Erectors, 224 F.2d 242.

[5]Hindeman v. First National Bank, 112 Fed. 931; and Chanin v. Chevrolet Motor Co., 89 Fed.2d 889.

Warranty

An express warranty is any statement of fact or any promise made by the seller to induce the buyer to purchase the goods, and the buyer does purchase the goods relying upon such statement or promise. On the otherhand, the implied warranty of merchantability or fitness for purpose does not require an express statement but is one which the law may imply from the facts of the sale itself, and may arise not only from the seller's statements or conduct, but from his silence and from the custom and usage of the trade.

The use of the term "warranty" has been abused, distorted and misused by courts and writers alike, to the point that today the image of the word bears little resemblance to its original concept. Actually in its inception the word warranty had a very simple meaning. In the early days of the common law if I ordered a sack of flour and the storekeeper gave me a sack of fertilizer instead, once I took it out of the store I had no remedy or cause of action against the storekeeper. The theory of warranty liability arose to remedy this unfair situation in the law of sales.

Up to now there has been no warranty of the unknowable; warranty must be measured at the time of the sale. No man can warrant what no man can know. New products introduced after extensive testing have produced some totally unexpected and unforeseeable injury. The mere happening of such injury, however, has not yet meant the automatic imposition of liability, for the extent of what is warranted must be judged as of the time of the sale, and not in the light of hindsight or subsequent development. To hold otherwise would be to impose an absolute standard of safety which the history of warranty liability does not justify. A theory of absolute liability has not yet been found in warranty law. The law of warranty is a part of the law of sales. Sales law has developed from the realities of the market place, not from the retreats of academicians interested in advancing theories of absolute liability or social insurance. Nothing in the law of warranty so far suggests that simply because a party uses a product and then is injured that the seller must respond in damages for his injury. In order for the buyer to recover for his injury in most cases he must prove that the product did not reasonably comply with the warranties of quality made by the seller.

It is also true that when the seller of the goods or machinery is informed by the purchaser of the purpose for which the articles are to be used, and the buyer relies upon the seller's skill or judgment, there is an implied warranty that the goods will be reasonably fit for such purpose. That provision, when applicable, may be deemed to be a part of every contract. But there is a distinction between an implied warranty that machinery is reasonably fit for the purpose for which it is purchased, and a mere statement that it is superior to some other type or that it will perform the desired work better. There is no implied warranty that a machine is the best on the market, or that it will accomplish a particular degree of efficiency. The implied warranty is fulfilled if the machine is reasonably fit to perform the work for which it is purchased.[6]

A warranty is nothing more than a part of a contract which is implied by law to show the true intentions of the parties. In essence, it is the covenant which assures the buyer that he will receive the particular product for which he has contracted.

Uniform Sales Act

For its provisions to be applicable, the Uniform Sales Act requires a sale of goods between a buyer and a seller. The Act contemplates a direct contractual relationship between the buyer and seller or their legal successors in interest, and the existence of this relationship has always been considered a prerequisite to recovery of damages for breach of the implied warranties.[7] In this connection, the Act expressly provides for such a cause of action only in the case of buyer versus seller.[8] The present weight of authority in states which have enacted the Uniform Sales Act is that privity of contract is a condition precedent in all transactions wherein the implied warranties are sought to be imposed.[9] To many socialistically inclined writers in halls of ivy, the word "privity" has almost become a dirty word. Just what is this obnoxious concept? To me it simply means direct dealing between the parties, either personally or by legally authorized agents or representatives. In the sale of foods and beverages a minority of states have carved out an expressly restricted

[6]Scheid v. Bodinson Mfg. Co., 79 Cal. App.2d 134.
[7]U.S.A. Section 15 (1) (2).
[8]U.S.A. Section 69 (1) (b).
[9]1 Uniform Laws Annotated, Section 15, Note 10, and 1957 Cumulative Pocket Part, Section 15, Note 10; 1 Williston, Sales, Section 24, Note 7.

area in which it is said that privity is not required for the implied warranties of quality to attach.[10] However, the majority of states under the Uniform Sales Act have not deemed it wise as yet to make an exception even in foodstuff cases, holding that privity is essential in all implied warranty actions brought under this Act.[11]

Imposition Of Liability Without Privity

In those cases where the requirement of privity is discarded we are no longer proceeding under the Uniform Sales Act or upon a contractual theory at all. Consequently, where liability is imposed without privity, it inevitably must be imposed upon the basis of tort theory. In examining legal theories in practice as they appear in recent products liability cases, it is apparent that judges cannot agree as to whether the basis of liability lies in contract or in tort. As a general proposition it seems that either set of principles may be applied, depending upon which best fits the circumstance of the particular case. What is more, the fact that a cause of action may be expressly based on warranty will apparently not deter the court from deciding the case on pure negligence grounds.[12]

Seemingly there is a tendency to forget that there exists substantial basis of liability in product liability cases wherein privity of contract is not a requirement, and proof of such liability need impose no insurmountable barrier to a proper claimant. I refer to the fact that even outside the implied warranty field there remain the theories of negligence, negligence *per se*, misrepresentation or deceit, and ultrahazardous activity. Unfortunately, we often find that these theories are confused with the implied warranty basis of liability, and particularly in those warranty cases wherein the court has criticized or abolished the privity requirement. In most of these cases the cause of action sounds in negligence or misrepresentation, with these tort theories simply dressed up in warranty clothes.[13]

In another category of cases, which may be called misrepresentation cases, there would also seem no necessity of a demonstration of privity. Here the injured party is claiming reliance upon an express representation which reached him in the form of advertising, sales literature or by way of the manufacturer's label. If in fact the product has failed to perform as advertised, it would appear that the tort concept of misrepresentation is being relied upon although the action may be brought in warranty terms. An example of this type of case is the one involving a soap package which contained a printed guarantee of quality. It was held that this guarantee reached from the manufacturer beyond the dealers to the ultimate user.[14]

On this point Dean Prosser has stated:

> Since the basis of this liability does not turn upon the character of the goods, but upon the representation, such decisions have not been confined to food, and have ranged over a variety of other commodities such as cosmetics, detergents, insecticides, automobiles, scrap metal, wire rope, dynamite, and a mattress... This branch of the strict liability appears by now to be well established.[15]

The Supreme Court of New Jersey in the now famous *Henningsen* case stated as follows:

> And of tremendous significance in a rapidly expanding commercial society was the recognition of the right to recover damages on account of personal injuries arising from a breach of warranty. The particular importance of this advance resides in the fact that under such circumstances strict liability is imposed upon the maker or seller of the product. Recovery of damages does not depend upon the proof of negligence of knowledge or defect.

The same court directly on the subject of privity had the following to say:

> Although only a minority of jurisdictions have thus far departed from the requirement of privity, the momentum in that direction is most certainly gathering momentum. Liability to the ultimate consumer in the absence of direct contractual connection has been predicated on a variety of theories. Some courts hold that the warranty runs with the article like a covenant running with the land; others recognize a third party beneficiary thesis; still

[10]Wilson, Products Liability, Part I; 43 Cal. L. Rev. 614, and Prosser, Law Of Torts 508; Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041.

[11]1 Williston, Sales, Section 244 (Rev. Ed. 1948).

[12]Spence v. Three Rivers Builders and Masonry Supply, Inc., 90 N.W.2d 873. ("There is authority for treating actions of this kind based upon implied warranty by the manufacturer as though they were explicitly grounded upon negligence.")

[13]Hertzler v. Manshum, 288 Mich. 416, 200 N.W. 155.

[14]Free v. Sluss, 87 Cal. App.2d 933, 197 P.2d 854.

[15]69 Yale L. Jo. 1136.

others rest their decision on the ground that public policy requires recognition of a warranty made directly to the consumer.

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile.[16]

It takes no crystal ball for one to theorize that before too long the defense of lack of privity will largely disappear from the products liability warranty scene and the manfacturer will be liable to anyone who uses his product regardless of how the user obtained the article.

Some Random Thoughts On The Handling And Preparation Of A Products Case

1. Was there a warranty?

One of the first acts in the handling of a products liability case should be an inquiry to determine whether or not there is any possibility of the existence of any kind of a warranty whatsoever, real or imaginary. This seems elementary but often is not fully explored. All correspondence in connection with the transaction should be examined. Was the sale as a result of a written contract, a signed order or any other written instrument? Was the product enclosed in a box, or did it have a wrapper or instruction sheet which might contain a guarantee or a description or a warranty? All advertising should be examined as it is now clear that advertising may constitute an express warranty.

It is also well to carefully check into any conversations or statements made in connection with the transaction or sale because a spoken warranty can be just as valid as a written warranty, and in fact may be more dangerous as being susceptible of exaggeration, change, misinterpretation or distortion. Human nature being what it is, and the possibility of reward for slight changes or additions of wording being so great, it is apparent that this possibility should be carefully explored.

2. Possession of the product.

It is also important to immediately obtain possession of the product or goods involved if this is at all possible. In this connection it is well to remember that it may later be necessary to establish the chain of possession of the product or goods, or the sample thereof, in court so it should be preserved, kept, examined and tested with this in mind. An examination should be made by the technical representatives of the insured, and in most cases it is extremely important to immediately obtain the most qualified, independent expert possible to examine or test the product involved.

3. The manufacturing or preparation process.

Another important phase of defense preparation is a detailed and careful study of the entire process of manufacture or preparation of the product of goods involved. This may be time consuming but is important. The how or why of the occurrence must be definitely determined, and be capable of demonstration before the merits of the case on liability can be evaluated. Here the insured or his technical and production personnel can often be of invaluable assistance. Many manufacturers and processors have such complete records that a particular batch or product can be followed through the manufacturing procedure from start to finish. Sometimes invaluable assistance can be obtained from the remote manufacturer or processor or the trade association or scientific organization to which the insured may belong. Often the remote manufacturer or association may have extremely valuable data, literature, information, or even experts which they are glad to make available, either as a general service or because of a jealous regard for the reputation of their own product.

4. Experimental results.

The use of experiments or tests performed both in or out of court by a qualified expert can frequently be important in a products case. It can often be demonstrated that the particular product involved could not cause the damage or injury complained of when used in the manner indicated or claimed. It is a type of evidence which can create a strong impression upon a jury, and the courts are becoming more and more lenient in allowing this type of testimony. Only a few simple, general rules can be drawn from the reported cases, as by the very nature of this type of evidence, each case presents distinctive problems. Presence or absence of a sufficient and proper foundation is usually the test applied, and is frequently determinative of the decision of the court as to its admissibility. In gen-

[16]Henningsen v. Bloomfield Motors, 161 A.2d 69 (1960).

eral, the conditions under which the experiment or test is performed must be shown to be substantially the same as the actual occurrence, in all material details, as a prerequisite to the admission of such evidence.

5. Cause of the injury.

It is extremely important to be able to show what happened in a particular case. It is not enough to contend that there was nothing wrong with the product and to show the method and extreme care used in the manufacture of the product, even when the plaintiff himself cannot show evidence of any defect or of negligence. A good example of this is the *Henningsen* case. There a complete examination of the car after the accident failed to show any defect of workmanship or assembly or any defective parts of the automobile involved, because of the condition of the car. The only evidence on this point was by an expert to the effect that something went wrong with the steering wheel mechanism which must have caused the car to collide with the brick wall.

The defendant likewise was unable to show how the accident happened or the cause of the damage and the mere fact that the defendants could not explain what happened was enough in this case to make them liable under the breach of warranty theory. This again points out the advisability of a prompt technical investigation, a reasonable theory or explanation as to what occurred with competent evidence to support it.

In further illustration of this point is the case in which a woman claimed to have been injured by swallowing a small piece of wire in a pancake which she had made from a well known manufacturer's pancake mix flour. She was absolutely certain the event had occurred on a particular day. This particular manufacturer puts a code number on all bags of flour it manufactures. From this code number they were able to trace the day on which the particular bag involved was manufactured and obtain the names of the employees who were working on the production line at the time it was made. From a complete working model to scale it was possible to describe the process to the jury to show that because of the screening system for sifting the flour it was impossible for a wire of the size alleged to get through the screen into the bag. Furthermore, they were able to trace the bag from the time of delivery from the manufacturer to the time it was ultimately delivered to the retail grocery store. By this process it was shown that the bag could not possibly have gotten to its destination until three weeks after the date that the plaintiff claimed the accident occurred.

6. Reasonableness the criterion.

Where the scope of the implied warranties is measured by the standards either of the contract or of the specific industry at the time of the sale, the fact that a product causes injury or fails to satisfy the purchaser is not the test of its compliance or noncompliance with such warranties. The test is one of reasonableness. Certain foodstuff cases illustrate this point.[17] Where food contained a natural but harmful ingredient, the guiding rationale is that under the standards of food processing there is a possibility that certain foods may contain certain injurious elements inherent to the particular food. Thus, in spite of often severe injuries to plaintiffs, the courts have held as a matter of law that there has been no breach of implied warranties where personal injuries have resulted from, for example, a chicken bone in a chicken pie;[18] a bone in a turkey dinner;[19] a fish bone in a "hot barquette of seafood mornay;"[20] a bone in a serving of breaded pork chops;[21] and a bone in creamed chicken.[22]

7. Special considerations in food cases.

Food cases pose many interesting problems. For example, consider the position of the restaurant owner who serves food or drink and obtains some of it from others in cartons or bulk containers, sealed cans or bottles and then passes it on to the consumer. This is done under such circumstances that the owner has no opportunity to test the product which, because of contamination or other harmful ingredients, causes damage or injury to the consumer. Most states now follow the majority rule which has been termed the Massachusetts-New York Rule, which holds that a proprietor serving food to paying guests impliedly warrants that the food is wholesome and fit for human consumption and is liable for

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[17]Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 59 P.2d 144.

[18]*Id.*

[19]Silva v. F. W. Woolworth Co., 28 Cal. App.2d 649, 83 P.2d 76.

[20]Shapiro v. Hotel Statler Corp., 132 F. Supp. 891.

[21]Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366.

[22]Goodwin v. Country Club of Peoria, 54 N.E.2d 612.

injury to his guests without proof of negligence or fault.[23]

A practical move at this point is to check with the supplier of the suspected food product to determine whether or not the supplier had a dealer's endorsement on its products liability policy protecting the restaurant or store owner involved.

Unfortunately, there has been a confusion of basic legal principles in our court decisions.[24] Such confusion of theories is particularly apparent in the food cases, wherein the vast majority of decisions appear to discuss negligence issues in warranty terms. Actually, so-called "foodstuffs exception" to the requirement of privity in warranty cases is fundamentally a judicial recognition of the obvious fact that where a mouse or human toe or particle of glass or arsenic has found its way into prepared food or drink, someone in the chain of preparation has failed to use that degree of care which a buyer has the right to expect.

8. Notice requirement.

It is still true, at least as of this day, that plaintiff must prove (1) the existence of a warranty in his favor, express or implied, (2) his reliance upon that warranty, (3) a breach of that warranty by the defendant, and (4) notice to the defendant of the breach of warranty within a reasonable time. Just what constitutes a reasonable time within which to give notice of breach of warranty is an open question, but it has been held that the filing of a complaint does not constitute such a notice.

9. Unusual susceptibility.

The general weight of authority throughout the United States is that in an action by a buyer of a product against the seller for breach of warranty, no liability can be imposed where the buyer was unusually susceptible to components in the product.[25] The essence of these decisions is that it would be unreasonable to imply a warranty extending to those persons whom the manufacturer could have no reason to foresee would be harmed by his product.[26] The crucial question is one of "foreseeability," the inquiry focusing on whether the susceptible plaintiff is a member of an identifiable class as to which an effective warning is possible, or whether such plaintiff is one of the unknown, unclassified few, who is later discovered to have been unusually susceptible.[27]

10. Evidential considerations.

As a general rule of evidence, improvements, new knowledge, new techniques, repairs made or precautions taken after an accident may not be shown. Such evidence is generally not relevant on the issue of negligence at the earlier time.[28]

Even though an inference of negligence at the earlier time is probable, the evidence is excluded because of the countervening policy that the admission of such evidence would discourage others from improving the place or thing or technique which caused the injury.[29] Of course it is usually the plaintiff who seeks to introduce such evidence against a defendant who has made the later changes or improvements. However, in a products liability case the reverse is often the situation. The defendant may wish to show that new scientific knowledge or newly discovered techniques have been developed to prevent the very event or condition causing injury from occurring, but that this knowledge was unknown and unforseeable at the time of the sale.

It seems clear that evidence of subsequent precautions is admissible where it is introduced not just to show the precautions or newly developed techniques, but to demonstrate a condition existing before and continuing after an accident and tending to establish the cause of the accident by further showing that when the condition was changed the trouble was removed.[30] In addition, it also seems clear that evidence as to subsequent changes or precautions or new knowledge is admissible if it is in response to the evidence of the other party or evidentiary inferences that the condition was free from defects.[31]

11. Trade names and trade usage.

Where an article or thing is sold under a trade name or patent name this fact is not a defense as regards the implied warranty of merchantability. However, the fact that a

[23] 37 ALR2d 1027.

[24] Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873.

[25] 26 ALR2d 963.

[26] Merrill v. Beaute Vues Corp., 235 F.2d 893; Worley v. Proctor & Gamble Co., 253 S.W.2d 532; Stanton v. Sears Roebuck Co., 38 N.E.2d 801.

[27] Zirpola v. Adam Hat Stores, 4 A.2d 73; Bianchi v. Denholm & McKay Co., 19 N.E.2d 697; 121 ALR 460.

[28] Helling v. Schindler, 78 P.2d 710.

[29] 2 WIGMORE, EVIDENCE, Third Edition, Sec. 283.

[30] Dow v. Sunset T&T Co., 106 Pac. 507; 18 CAL. JUR.2d, Evidence, Sec. 148.

[31] People v. Lang Transportation Co., 110 P.2d 464.

buyer selects an article or thing by its trade name or patent name is a defense against the buyer on the implied warranty that the article is fit for the particuular purpose for which it may have been purchased. In this situation, however, if the buyer has relied upon the skill and judgment of the seller when purchasing an article suitable for a particular purpose, which the buyer has made known to the seller, then a warranty that the article was fit for the purpose intended may arise.

When the article or thing is designed or fit for only one purpose or use, then there is no distinction between the warranties of merchantability and fitness for a particular purpose.[32]

A warranty may be implied by the usage of the trade if at the time of the sale the buyer has knowledge of and relies upon such usage of the trade.[33]

12. Allergy.

Generally speaking a seller has no liability where the injury results from an allergic reaction.[34] However, there are exceptions to this rule and a seller may be liable for failure to warn the buyer of an ingredient in his product which is potentially harmful to one allergic to this ingredient and this exception somewhat depends upon the number of persons allergic to such substance and knowledge upon the part of the manufacturer or seller that some persons are so allergic to the product.[35]

13. Examination before purchase.

Where the buyer actually examines the goods or article before purchasing, there is no implied warranty insofar as regards defects in the goods or article which should have been observable upon the examination by the buyer. However, the seller is not relieved of liability for any such defects which would not have been observable upon a reasonable examination. In most states, although there are some exceptions, if the seller gives the buyer an opportunity to make such an examination but the buyer does not do so, the same rule applies.[36]

It should be remembered that opportunity to examine the goods or the actual examination itself does not relieve the seller from any express warranty.[37]

14. Use after notice of defect.

Another possible defense to a breach of warranty action is to demonstrate that the injury was received as a result of the use of the thing or article after it was known to be defective in some manner. This is perhaps analogous to the defense of assumption of risk.[38] In other words, if a buyer has discovered a defect in the article or thing and still continues to use it and injury results, it seems clear that such injury was not the proximate result of any breach of warranty. Similarly, if the defect is so apparent that it would be revealed by a reasonable inspection of the article, then there is a question as to whether or not the buyer is under a duty to make such an inspection.[39]

15. Contributory negligence.

Contributory negligence is not generally considered a defense to a warranty action. However, failure to follow easily understood and plainly observable instructions as to how the product should be used may constitute a defense. This seems to be treated as a form of assumption of risk, particularly when a person uses a product with knowledge of a defect, danger or risk.[40]

16. Who made the defective part?

It should be remembered that there is often a possibility that some specific part of the product manufactured was not made by the insured but was purchased from an outside fabricator or manufacturer or jobber and the failure of this particular part may be the cause of the accident, giving the insured a right of action over against such outside fabricator or manufacturer.

17. Reasonableness of the use.

The manner in which the product was being used at the time of the alleged accident should also receive attention as there may be a question of overloading, unusual or unanticipated use of the product, or actual misuse of it which may have been a contributing cause of the accident.

[32]Gottsdanker v. Cutter Laboratories, 182 ACA 694.

[33]Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547.

[34]McLachlan v. Wilmington Dry Goods Co., 22 A.2d 851.

[35]Smith v. Denholm & McKay, 192 N.E. 631; Proctor & Gamble v. Superior Court, 134 Cal. App.2d 157.

[36]1 Uniform Laws Annotated, Sec. 15, Notes 191 to 230; McCormick v. Hoyt, 333 P.2d 639.

[37]Rudd v. Rogerson, 297 P.2d 535.

[38]Prosser, Assault Upon The Citadel, 69 Yale L. Jo. 1099.

[39]Gascoygne v. Carry Brick Co., 104 N.E. 734.

[40]Gomes v. Byrne (Cal.), 333 P.2d 754 (1959); Brown v. Barber, 174 S.W.2d 298.

DISCLAIMERS

1. In general.

A manufacturer or supplier may attempt to eliminate or limit his liability to the consumer by some statement to that effect in the contract of sale documents or on the label or direction sheets. This attempt to limit liability is called a "disclaimer."

The general rule appears to be that a manufacturer cannot disclaim his liability based upon negligence.[41] A manufacturer has the right to disclaim liability for warranty, express or implied, as to many types of products.

Some courts have refused to honor disclaimers in food cases on the grounds that to do so would be against public policy which favors protecting health.[42] Other courts have allowed such disclaimers as a defense.[43]

A disclaimer on the invoice after the sale is completed is not effective. Also, a letter containing a disclaimer of warranty sent after the sale has been consummated was not sufficient to modify the terms of the original contract. However, if the buyer has actual notice that the product contains a disclaimer, it will be effective although it was not actually mentioned at the time the sale was consummated. Disclaimers on labels or direction sheets attached to the product are ordinarily effective. One court made the statement:

> Notice of disclaimer can be conveyed to the buyer by means of printed notices on letterheads, labels and the like.[44]

It is also a general rule that the liabilities and risks disclaimed must be specifically identified. The seller's express refusal to give any warranty except such as may be expressed in the contract or on the label, is frequently held to be an effective disclaimer. But there are many exceptions to this rule, particularly in products for human consumption and other products of a dangerous nature, and each case must be individually considered in the light of the facts and circumstances surrounding it.

The warranty and any disclaimer of warranty must be clear, explicit and unambiguous to be effective.[45] The language used will be strictly construed against the seller.[46] In order to avoid the implied warranties of fitness and merchantability, they must be expressly disclaimed in order to be avoided.[47]

The statements of warranty and disclaimer should not be hidden but should be specifically made a part of the agreement if they are to be effective. It would seem that if the warranties and disclaimers are clearly set out and the buyer has actual knowledge or is charged with actual knowledge, then they will probably be effective.[48]

The warranty and disclaimer can be made a part of the bargain if they are included in the various documents which are part of the bargain. For example, the order blank, letters, statements on letterheads, and advertising material. In the case of advertising, care should always be exercised in making advertising statements so that nothing will be said which is inconsistent with the express warranty and disclaimer.

An appropriate statement to be included on all order blanks, for example, would be something along the lines of the following: "Notice is hereby given that seller gives no warranty of fitness for purpose or merchantability, express or implied. The only warranty made is as expressed in the direction sheet enclosed with the product and the terms of said direction sheet are incorporated herein as if fully set out. If the purchaser does not accept the goods when delivered on these terms, they are to be returned to us at once and any purchase price will be refunded."

In the *Henningsen* case the buyer signed the usual automobile purchase agreement containing a blanket disclaimer of all warranties with the exception of a warranty stated in the agreement with a limitation of liability to the replacement of defective parts in the automobile. The New Jersey Supreme Court had little trouble in brushing aside this broad disclaimer of any warranty liability and took the automobile manufacturing industry severely to task, saying: "The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices." The court felt that the automobile manufacturers' associations had gone too far in drawing up its standardized form eliminating virtually all warranty responsibility. This case is a

[41] Ebers v. General Chemical Co., 17 N.W.2d 176.
[42] Lynn v. Radio Center Delicatessen, 9 N.Y.S.2d 110.
[43] Rockwell & Co. v. Parrott & Co., 19 P.2d 423.
[44] Burr v. Sherwin Williams Co., 42 Cal.2d 682.
[45] McPeak v. Boker, 53 N.W.2d 130.
[46] Burr v. Sherwin Williams Co., 42 Cal.2d 682.
[47] Lindbergh v. Coutches, 167 Cal. App.2d 828.
[48] India Paint Co. v. Steel Products Co., 123 Cal. App.2d 597.

clear indication of the fact that a simple, broad disclaimer of all warranty liability in a contract of sale will in most cases not be effective. The manufacturer must accept risks for which he should reasonably be responsible and a disclaimer of liability to be effective must be specific as to the hazard for which responsibility is disclaimed with full explanation as to the reasons therefor and the methods by which such hazard may be eliminated, if that is possible. Some hazards cannot be eliminated and the choice of whether to use the product in the face of this possible risk is then left to the buyer to make his choice with full knowledge of the hazards involved.

2. Recommendations for effective disclaimer.

Following are some specific recommendations to any manufacturer desiring to use an effective disclaimer:

1. The lettering of the disclaimer should be at least of equal size, if not larger, than the rest of the lettering on the document in which it is contained. It should be in a conspicuous position. If it is in fine print, hard to read and hidden in the body of a long document, my suggestion is just to forget about it—it won't be of much help.

2. The maufacturer's method of selling should be considered as it is necessary for it to be effective that the disclaimer be brought to the buyer's attention before the contract is completed. For example, on order blanks, labels or direction sheets.

3. A disclaimer intended for the public should appear on the label. If this cannot be done because of insufficient space or some other reason, it should appear on the directions, and the label should state that it is mandatory to read the directions before using the product.

4. If the product is one which is produced under any government regulations or requirements or specifications, an express warranty should be made that the product was prepared in compliance with and according to such governmental regulations, specifications or recommendations.

5. The user should be advised not only of all known risks or contra-indications in using the particular product, but also that there may be unknown risks involved because of varying individual susceptibilities and other factors for which no responsibility can be assumed.

6. The disclaimer should state that no other warranties than those set forth are made regarding the product and that no person is authorized to make any other warranties.

7. The disclaimer should plainly say that the manufacturer assumes no liability other than as expressly warranted and consequently will not be liable under any implied warranties of merchantable quality or fitness for purpose.

8. Known or suspected risks or hazards should be specifically identified and warned against and then disclaimed with particularity, giving the reasons therefor.

In other words, it is not safe to rely upon the defense in a warranty products case that the label on the container of the product states, "Seller makes no warranty of any kind, express or implied, regarding the use of this product." Yet it is surprising even today to notice how many products are still sold with just such an ineffective disclaimer attempted.

It is not suggested that this is a complete list nor is it contended that a disclaimer prepared in accordance with it guarantees insulation from liability in all cases. However, even if such a disclaimer had no legal effect at all, I believe it would still have a threefold and very real practical effect. First, it would provide the trial lawyer with many good points of argument in court and would let the jury know that the manufacturer had done everything in his power to warn of known hazards and that his intention was to limit his liability to those hazards and not to warrant the unknown. Second, it would prove a strong deterrent to unjust or exaggerated claims; and third, it would be helpful in negotiations attempting to obtain fair and reasonable settlements in many types of products liability cases.

It seems to me that the real test as to whether or not a disclaimer will be held valid or invalid is whether or not the buyer as a reasonable person fully understands that there is no warranty accompanying the sale, or if the warranties are restricted, then that such a reasonable man would understand just what the warranty is that goes with the article being purchased.[49]

Concept Of Absolute Liability

We should vigorously oppose the proposition that warranty liability follows absolutely from the use of any product causing injury, regardless of cause, regardless of its

[49] 1 Williston, Contracts, Section 239A, page 165.

foreseeability, regardless of knowledge of any defect, and regardless of the impossibility of preventing the occurrence under the circumstances of the particular case.

The application of such an absolute liability concept, as urged by the plaintiff's bar, is grossly unfair when there is a realization that here is an attempt to hold liable not only without fault, but to hold liable for factors which were at the time of manufacture unknown to anyone. This would create liability on the grounds that the scientific or technical knowledge at the time was incomplete. This is unreasonable and unfair, for in any production or manufacturing field there are a great many variables. As wonderful as it would be, our scientists, technicians, manufacturers and research men cannot foresee the future any more than we can, and to hold them liable for unknown future ramifications would be as ridiculous as holding a police chief responsible for crimes committed in his district. No matter how careful, strict, or diligent one might be, there are too many variables to enable one to know the future.

For purposes of illustration only, let us consider its effect upon the medical and drug field, although the same principles would apply with varying effect and perhaps in a different manner in almost all fields. Medical science has made advancements in the past which have resulted in the saving of untold lives and in the alleviation of many of the pains of mankind. The creation of such an absolute warranty liability concept would greatly impair future progress. The introduction of new products and procedures would be delayed and there would be an adverse effect upon the continual advancement of medical science. This is not overdramatization for it seems clear that researchers would be unwilling to try new drugs on patients, practicing physicians would be hesitant to avail themselves and their patients of new drugs, and pharmaceutical manufacturers would be less willing to produce the products, should this concept be applied, for it holds the defendant liable without fault and liable for the unknown.

There are products that are not proven to be entirely safe but are of such a social good that man must be allowed to avail himself of them. In this category falls such a commonplace biologic as smallpox vaccine, a biologic which the United States Government requires to be given to all persons entering this country.

Despite the fact that smallpox vaccine was first developed by Jenner over 200 years ago and has been vastly improved since, an occasional highly susceptible individual still comes down with generalized vaccinia or with encephalitis which has and can lead to death. Should the manufacturer be held liable for the knowledge that doesn't exist, even today, of how to produce or test a smallpox vaccine which will not have the unfortunate result in the rare, exceptionally susceptible individual? Surely the reasonable answer is no, and surely the millions of persons who have been saved from the dread disease by the vaccine are living testament to the wisdom of the continual use of that vaccine. There are many such procedures, agents and medicines which are lifesaving or healing, but nevertheless capable of severe injury. It seems clear that *had* such a concept of liability through warranties and the application of the sales acts been applied to biologics and drugs 200 years ago, Dr. Jenner and his colleagues would probably not have been able to make the giant contribution of the smallpox vaccine to mankind. If such a concept is applied now, other valuable medical or scientific procedures might be lost.

Since the fact is self-evident that certain treatments will save lives or alleviate suffering, it is unrealistic and unreasonable to say that there must be no unknown, untoward effects. If we take this position, then the conquering of disease or the advance of science in the future will be far slower, as manufacturers cannot guard against the unpreventable. Thus the healing drug or biological that may save thousands of lives every year from cancer or some other condition which might be available tomorrow would probably, under this situation, be withheld for several years or so of testing and "wait and see" and "make sure." It is true that a statistically small number of hypersensitive or hypersusceptible individuals will thus be saved from harm, but in the meantime thousands who might otherwise live, or live without suffering, will necessarily be denied such relief.

Many of the new products coming onto the market involve both manufacturing and testing techniques of incredible complexity. They are constantly subject to change and improvement as scientific research pushes back the borders of the unknown. To withhold the benefit of new discoveries from the public over years of precautionary testing

would certainly be no service to society. The development or use of new preventive and curative agents, for example, cannot be expected to combine absolute efficacy and safety in the first instance.

How can any manufacturer become involved in any forward steps in science or medicine, no matter how surrounded by official standards, if he is to be held responsible for knowledge that does not, and cannot, exist until the future unfolds. The answer is obvious. The application of such a stringent concept of implied warranties would restrict scientific and medical progress to the public detriment.

To the manufacturer of any product and to all those who deal with its subsequent handling such extension of this doctrine may require a reappraisal of the extent of warranty liability, not merely where the product causes some harm, but also where it fails to perform as expected. It is the combination of these elements which renders the changes and developments in this field of such great general public interest.

Conclusion

I submit in conclusion that organizations such as this, their members individually and collectively, and the insurance industry whose obligation it is to provide protection against such risks at reasonable cost, should forcefully and continually campaign before legislative bodies and judicial tribunals that the following issues be determined by the court or jury as questions of fact and not of law:

1. Is there a warranty in the particular case?
2. If so, the nature and extent thereof. What is the warranty?
3. Was there a breach of the warranty that was a proximate cause of the injury?
4. Was there contributory negligence on the part of the person injured?

And finally, that a finding in favor of the defendant on any of these issues would constitute a valid defense in a proper case.

This concept is fair to both sides. More we should not ask. Less we should not accept without a battle.

Education For The Lawyer

ROBERT J. NORDSTROM
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NOT so many years ago the phrase "legal education" had a very limited meaning. Aside from referring to the traditional three-year curriculum leading to the LL.B. (or J.D.) degree, it embraced only the graduate programs which had found their way into a few law schools. These programs had limited value. They were aimed at the lawyer who was willing to take one or two years away from his practice to pursue legal learning in a scholarly atmosphere. Most often this lawyer was about to enter the teaching profession and his graduate degree became his passport to some law faculty. In their nature these programs could not reach the profession as an entire group. Only infrequently—and then primarily through the legal literature—did these graduate courses and curricula affect law as it was being practiced by the lawyer "back home". The idea of legal education had a very limited meaning.

This, happily, is not so today. First, most law schools recognize that legal education begins long before the student commences his courses in Contracts, Torts, Property, and so on. It has its roots in strong college backgrounds; it reaches into the high school. It is here that the student develops (or fails to develop) effective study habits, competency in language and expression, powers of logical reasoning, knowledge of the institutions of our society. Law schools are, therefore, taking increasing interest in the college educations of their applicants.

Legal education is not just looking back to the academic foundation of its students; it is also vitally concerned with continuing the education of each and every member of the profession. The full education of a competent lawyer must continue throughout his active practice; the law-school years are sufficient only to lay the formal underpinning for further education as a practicing lawyer. Realization of this explains the newer short courses, conferences, and institutes now more familiar than the technical graduate programs of less recent origin.

When the law student finishes three years of law school, he has little or no idea of what branch of law he will practice. Whether he will be a tax, bankruptcy, antitrust, government, labor, trial, corporate, workmens' compensation, surety, or you-name-it lawyer most often depends on the kind of position he obtains on graduation. Therefore, a fourth year of law school can do little to help him specialize. It is a simple, hard fact that our neophite has no notion of which area he should select. The law school is going to have to wait until he begins his practice before it can really help him as a lawyer.

Another hard fact with which we must deal is that the practitioner does not live in a world of luxury in which he can take nine months away from his office to come back

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In March, 1959, he was appointed by Ohio State President Novice G. Fawcett to head the Mershon Committee on Education in National Security. The 12-member committee has the task of developing and conducting a broad program of education and research in national security at Ohio State.

Born in Cadillac, Mich., Dean Nordstrom received the bachelor of arts degree summa cum laude from Western Michigan College of Education (now Western Michigan University) in 1948 and the juris doctor degree from the University of Michigan in 1949.

He joined the faculty as an assistant professor in 1951, was made associate professor in 1954 and professor in 1957. He was appointed assistant dean of the College of Law in 1953 and was advanced to the associate deanship in 1956.

Before coming to Ohio State, he was associated with the law firm of Hinkley, Allen, Salisbury and Parsons in Providence, R. I.

Dean Nordstrom was selected the "Outstanding Young Man of the Year" for 1958 by the Columbus Junior Chamber of Commerce and later was named one of the five outstanding young men in Ohio.

Among his professional associations, Dr. Nordstrom is presently serving as president of the League of Ohio Law Schools and as a member of the Board of Trustees of the Ohio Legal Center. He has contributed several articles to professional journals in his field.

to school. Perhaps he can spend a weekend or two during the winter and a week or two during the summer, but these are the limits. He has clients with deadlines.

In combined effect these facts have produced the programs of continuing legal education, which have recently given to "legal education" a new dimension. At Ohio State we have been offering short courses for as-many-as-possible segments of the bar. In a typical year there will be courses covering taxes, probate, corporations, negligence cases, real estate, and commercial law. We also have seminars for judges and courses for prosecutors. In size these varied courses run from 18 to 365, the capacity of our airconditioned auditorium. They reach the sophisticated expert, the general practitioner, and the young law school graduate. In any one year nearly ten percent of the Ohio bar now continue their legal education at Ohio State.

Two features of such newer programs stand out:

1. Courses cannot be arranged in the usual law school manner. That is, a short course on Contracts, Mortgages, Future Interests, or Corporations stands little chance of success. Lawyers don't get problems in these categories. Instead, the courses must "cut across" usual law school lines so they handle problems as the lawyer gets them. They must deal with problems of business, probate, negligence, and so on. They treat financing, taxes, property, evidence, partnerships, procedure, and substance. Perhaps the courses being developed in programs of continuing legal education are pointing the way to a new approach to the undergraduate law curriculum.
2. Teaching techniques must be different from those used in the traditional law course. Reading cases and reciting on them may train the undergraduate; it will not support a course for lawyers. The "easy" substitute is the lecture but several hours of even the best speaker becomes monotonous. Ohio State combines the lecture with *well planned* demonstrations and panel discussions. These must be *well planned*. Countless hours are spent in writing scripts, in rehearsal, and in planning to make the phases move with precision and toward the goal of education for the lawyer. In one recent institute over 750 lawyer-hours of preparation went into its planning.

Ohio State University is now joining with the Ohio State Bar Association and the Ohio State Bar Association Foundation in a unique venture in cooperative action in continuing legal education on the State level. The Ohio Legal Center, an Ohio corporation not for profit created by the three entities, will seek to provide statewide leadership in the design and presentation of programs of education for the bar of Ohio. Housed on the campus of Ohio State University in a structure built from funds contributed by the lawyers of Ohio ($750,000), the center will combine the strength of the organized bar, headquartered in the building, with the educational leadership of a great university. Its aim will be to provide, in active cooperation with all local bar associations and the other Ohio law schools, a common program of varied courses of uniformly high quality, thus minimizing the disturbing duplication of effort so common to law school and bar efforts throughout the country. The objective is nothing less than that of making available to every Ohio lawyer the opportunities for post-admission legal education that will enable him to meet his need for *continuing* professional training.

The program sponsored in Montreal was a resume of a two-day institute in the area of negligence which Ohio State sponsored in December of 1960. The original teachers were Messrs. Jack Alton, James Britt, James Davis, John Elam, George Tyack, and David Sindell. It centered around the settlement of a personal injury case involving permanent injuries. Four demonstrations —complete with a hospital bed, a plaintiff with his leg in a cast, and a real-life doctor —were used to get the capacity audience acquainted with the problem. Panel discussions by experts highlighted the lectures which broadened the course beyond the confines of the facts of the one case. Notebooks furnished all registrants not only carried pictures of the accidents and portions of the hospital record, but also were filled with citations to Ohio law. Practical tips for both the plaintiff and defense lawyer were combined with a thorough search into the substantive law of the problem. The two articles which follow (by Jack Alton and John Elam) are two of the papers presented at that conference and at the annual meeting of this Association in Montreal.

Settling Personal Injury Claims

JACK R. ALTON
Columbus, Ohio

IN discussing the subject "Settling Personal Injury Claims", I want to approach the question from a somewhat different standpoint. We could all relate many cases which we have settled favorably, but the mere relating would not give the rest of us any real basis for a dynamic approach to the problem. In searching for the key to the answer, the thought comes to mind that the basis of any good settlement is a complete investigation of the facts. Certainly a sound knowledge and application of the law is important, but once it is determined that a case is one which will go to the jury, the settlement figure will depend to a great extent on our knowledge of the facts. The late Justice Oliver Wendell Holmes said, "The fountainhead of the law is the facts." In like manner, we believe that the foundation of good settlement is complete investigation of the facts.

Our demonstration showed you a hospital interview, with the defense lawyer for the insurance company interviewing the injured claimant as he was coming out of the ether. We are not here to argue the relative merits or demerits of hospital statements. The main point we want to make in connection with the hospital interview is that it shows not only an early contact with, and investigation of, the claimant, but it illustrates an early alignment of the insurance company and defense counsel in the handling of what promises to be a difficult claim.

The first point we want to make regarding investigation, therefore, is that where a serious injury claim is involved, an early liaison should be established between the insurance company and the man who will eventually try the case, so that the trial lawyer can either actively engage in portions of the investigation, or he can at least consult with and advise the men actually doing the investigation. Too often we hear a trial lawyer express regret that certain aspects of investigation were not covered early in the case. By an early establishing of cooperation and consultation, a more complete and usable investigation can he had.

Since we had a court reporter hospital statement in our demonstration, we might comment on the taking of hospital statements. First, it is imperative that the person taking the statement, be he lawyer or adjuster, take no advantage of the claimant. Our basis for the statement is not entirely altruistic. Since the statement is being recorded, any improper representations can be brought to the judge's attention, and possibly the jury's, if the case goes to trial. There is authority that opposing counsel can obtain the statement if it is used in cross-examination, and rehabilitate the witness.[1] The rehabilitation can easily be quite embarrassing, since almost any statement from an adverse party contains many things favorable to the claimant.

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Some of the advantages of hospital statements are:

1. The claimant's story of the facts is recorded before rationalization sets in.
2. A personal appraisal of the future plaintiff is made.
3. A relationship is established which may form the basis of settlement of the claim before trial.

Again, assuming the case goes to trial, the judge may require the defense to tell who took the statement, and the name of the insurance company employer, if the statement was taken by an adjuster.[2] For this reason, it is best to have a lawyer from the defense firm take the statement.

[1] Shellock v. Klempay Bros., 167 O.S. 279, 148 N.E. 2d 57.

[2] Wheaton v. Conkle, 57 Ohio App. 373, 14 N.E. 2d 363; Taylor v. Ross, 50 Ohio App. 577, 78 N.E.2d 395.

Following the initial contact with the claimant, the other standard investigative procedures will be used. Repair bills and photographs can help esablish the force of impact. Police reports, Bureau of Motor Vehicle reports, reports made by the claimant to other insurance companies, or agencies such as the Industrial Commission, all may divulge facts invaluable in the appraisal of the claim. In complicated cases, reenactment of the accident may be necessary to understand the liability features of the case. Movies of such re-enactments, or experiments, have been held to be admissible, provided the actual conditions of the accident are closely approximated.[3]

Perhaps the best source of information valuable to the defense is hospital records. It seems the future claimants are more honest in talking to doctors and interns than they are in relating their stories to their attorneys. Almost invariably, a hospital record contains statements damaging to the claimant, or material which can be valuable in cross-examining his doctors.

Moving pictures of the claimant have been used very successfully on television, but their use in actual practice is so fraught with hazard that great care must be used in their taking and in presenting them in court.

Other sources of information are the Veterans Administration records, health and accident companies which cover the claimant, and the personnel departments of employers large enough to maintain complete files. Recently a health and accident claim man gave us information about the past medical history of a plaintiff which proved invaluable during the trial. The same has been true of personnel departments, once their cooperation is established.

Some of the sources discussed up to this point require the authorization or consent of the claimant. We will now discuss the court connected investigative procedures which can be utilized without the consent of the claimant who has filed suit. In recent years the plaintiff lawyers have made bold use of the discovery techniques now available under the Federal Rules and most state codes. A broader use of such procedures by the defense should take the initiative away from the plaintiff bar in this vital area. One procedure being used by many defense firms is the filing of a comprehensive set of interrogatories inquiring into the general background of the plaintiff and his medical and accident history. With this background, the defense can then take the deposition of the plaintiff with a general idea of what to expect and look for, and the specific matters in contention can be developed more fully.

Although we must be complete and thorough in our fact finding, we must be cautious in preparing to take depositions. If the plaintiff is in poor health when the deposition is being arranged, consider the possibility that if he dies, the plaintiff's attorney can probably read the deposition which you have taken, even though the plaintiff's attorney may have conducted no direct examination at all.[4]

The same care should be used in preparing to take the plaintiff's deposition where your own insured is in precarious health. If your insured dies prior to trial, you may be able to suppress a great deal of the plaintiff's testimony by use of "The Dead Man" statute. However, by taking the plaintiff's deposition, you may have waived the right to rely on the "Dead Man" statute.

Another precaution in taking depositions concerns the asking of too many questions. I'm sure none of us is guilty of this in court, but in depositions the informal atmosphere and the opportunity to gain information may lead us to ask too many questions about the same subject. We believe this is dangerous. The same rule should be followed in depositions that we follow in court; that is, once a question is answered, don't go back to it again. If the plaintiff changes his answer in the deposition, the impeachment value of the first answer is nullified, since his attorney can read the second answer if you impeach the plaintiff with the first answer.[5] The psychological effect on the jury will probably be such that you will wish you had never gone into the subject.

If you have taken the plaintiff's deposition early in the case, you may wish to take another as the case approaches trial to bring you up to date. The answer to this question will depend largely on local practices and individual judges. Even if you are not allowed to take a second deposition, the correllated use of deposition and interroga-

[3]Streit v. Kestel, 108 Ohio App. 241, 161 N.E.2d 409; 62 A.L.R. 2d 686.

[4]Holliday v. Jones, 53 Oh. Law Abs. 167, 84 N.E. 2d 602.

[5]Shellock v. Klempay Bros., 167 O.S. 279, 148 N.E.2d 57; Ketterer v. Red Star Transit Co., 78 Oh. Law Abs. 123, 151 N.E.2d 587. In re Martin, 141 O.S. 87, 47 N.E.2d 413.

tories should provide a broad base of information for evaluating the case.

In our pursuit of facts we are sometimes met by a refusal of a witness or party to answer. This merely whets our appetite, since we all know that there must be a very choice piece of information behind a refusal. In Ohio we differentiate between witnesses and parties as to what questions must be answered. For instance, a witness cannot refuse to answer a question in a deposition on the basis that the question is not material and pertinent to the issues in the case. The only legitimate basis for refusal by a witness is that the witness has a legal or constitutional privilege excusing him from answering.[6] However, where the deposition of a party is being taken, the questions must be material and pertinent to the issues in the case.[7] In the event of a refusal, we have a procedure for presenting the question to the court for a ruling. I'm sure most of your states have a similar procedure.

A thorough knowledge of the facts requires a knowledge of the medical history of plaintiff. If plaintiff's counsel refuses to give medical reports, we are in a difficult position in Ohio, since we are not allowed to take the doctor's deposition.[8] Fortunately, the plaintif is not allowed to take our defense doctor either.[9] However, we are allowed to take a deposition of the hospital records, under the authority of the Uniform Business Record Statute.[10] As we mentioned before, this is a very good source of information. Jack Hebdon tells me that there is no doctor-patient privilege in Texas, so you Texans don't have to worry about these problems.

There is some authority that a non-medical expert witness may be forced to testify on deposition.[11] This, too, should be helpful in those technical cases requiring experts to testify.

Both the federal and most of the state procedures provide for forced production of documents.[12] This is especially helpful in cases involving wage loss claims. The courts are requiring plaintiffs to submit either exact copies of income tax returns, or to take the necessary steps to obtain a copy from the government and then turn it over.[13] The same rule should apply to any documented information.

Undoubtedly there are many other means available for finding facts, either under your own state procedures, or in the practices you follow in your own offices. I hope we have sustained our original premise that a good settlement is based on a good investigation of the facts—one in which the claim office and the defense attorney have cooperated and joined forces, so that all investigative procedures and all court-connected procedures have been utilized to find all the facts. Now John Elam will tell us how to settle a case once we are in a position to negotiate. Thank you.

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[6]In re Frye, 155 O.S. 345, 98 N.E.2d 798; 70 A.L.R. 2d 240.

[7]In re Rebersak, 106 Ohio App. 425, 150 N.E.2d 869.

[8]Ohio Revised Code Sec. 2317.02.

[9]In re Bates, 167 O.S. 46, 146 N.E.2d 306; 70 A.L.R. 2d, 384, 388.

[10]Weis v. Weis, 147 O.S. 416, 72 N.E.2d 245; 169 A.L.R. 668.

[11]Sachs v. Alcoa, 67 F.2d 570.

[12]Ohio Revised Code, Section 2317.33; Rule 34, Federal Rules of Civil Procedure.

[13]70 A.L.R. 2d 240.

Settlement Procedures

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SETTLEMENT is not an exact science. It has been described as an art which some lawyers, unfortunately, never acquire. Of course there are many aids, both real and imaginary, in the practice of this art. Only recently two companion loose-leaf services were advertised as giving such aid to lawyers. In their brochure, these questions were asked: "Are injury claims being settled too cheaply?" "Can jury verdicts be predicted?" The second question was answered, "Yes!" For most trial lawyers, the search for greater proficiency in this art continues.

Why is there the continuing interest in this subject? Importance of settlement procedures becomes apparent when one examines the available statistics of settlement vs. trials in personal injury litigation. While the statistical information varies according to the area of the country in which one practices, two areas are generally representative. In the Mid-West it is found that out of ten lawsuits which are filed only one of them actually proceeds to a jury verdict. Nine out of ten are settled somewhere between the date of filing and submission to a jury.

The statistics now available respecting New York City are even more striking. In an excellent article by the Columbia University Project for Effective Justice, it is pointed out that less than two per cent of the claims made go to jury verdict and slightly more than three per cent of the suits filed go to jury verdict.[1]

In other words, twenty-nine out of thirty lawsuits in New York City are settled, not by trial, but by negotiation! Settlement procedures, therefore, take on a great importance to every trial lawyer.

In this connection, however, it should be pointed out that, while substantial settlements create interest, they are not representative. The same Columbia Project found that over ninety per cent of the recoveries in personal injury litigation in New York City were less than $3,000.00. In the Mid-West, casualty insurance companies report substantially the same findings.[2] All of these studies suggest a substantial variance between the last settlement demand and the jury verdict.

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PHILOSOPHY OF SETTLEMENT

Settlement negotiations have been described as a cold, hard business. For trial lawyers, it is often easy to be an advocate and sometimes to be adamant. And yet, in many instances, it involves the highest degree of advocacy by the trial lawyer to effect a settlement. As stated in the beginning of this article, it is indeed an art to effect the objective of settlement. Settlements themselves are often frustrating to the trial lawyer. After a settlement is completed, the probing question remains in the lawyer's mind as to whether the case was actually

[1]For an excellent discussion of the many phases of this problem, see Marc A. Franklin, Robert H. Chanin, and Irving Mark: "Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation", Columbia Law Review, Volume 61, page 1 (January, 1961). Reprints are available by writing to Columbia University Project for Effective Justice.

[2]See discussion of representative figures for casualty insurance carriers by Wilbur W. Jones in "Evaluation at Settlement of a Personal Injury Claim for Damages (from the Viewpoint of the Defendant's Bar)", appearing in the 1959 Proceedings of the Section of Insurance, Negligence, and Compensation Law, American Bar Association. See also article dealing with the claims experience of All-States Insurance Company in Fortune Magazine, October, 1960.

settled for the right amount. There is no definitive answer to that question. There are only guides, some of which will be suggested in this article. Nevertheless, settlement is probably the most important tool available to the trial lawyer to reach a reasonably satisfactory result for a client, be it a plaintiff or an insurance carrier.

General Attitudes

Certain attitudes must be cultivated in approaching settlement negotiations. The first attitude is the ability to make a hard-headed analysis of the claim. The normal tendency of a lawyer is to examine everything in its most favorable light to his side of the controversy. This attitude must be cultivated by developing the concept of not fooling yourself or your client. If one fails to make a hard-headed analysis, he is then faced with a tremendous pit-fall. As an example, the attorney who gives a client an inflated notion as to the value of the claim in an off-the-cuff evaluation has, at that point, created a trap for himself. It will be difficult at a later point to make the necessary reductions in order to effect a settlement.

The second attitude is constantly reminding oneself that PREPARATION is all important. Settlement value cannot be determined without thorough preparation. Every trial lawyer seems to be under the constant pressure of time demands such as pleading deadlines, hearing deadlines, statute-of-limitation deadlines, appeal deadlines, trial deadlines, and all of the other hundred requirements of a general practice, which fits most trial lawyers. Therefore, when this lawyer comes to the average claim with a settlement value of approximately $2,500.00, it is very hard to give it the necessary preparation so that he will be convincing in the settlement negotiations—and yet *preparation* in any case does become *all important*.

A settlement attitude of fairness and friendliness is also required. The trial lawyer who is out to make a reputation or who is out to belittle his opponent (and this situation does occur) faces a real problem in the given case and in future cases. Such a lawyer is building a reputation which will hurt him in the future. He is also doing a real disservice to his client in the particular case; again, it doesn't make any difference which side he represents. Being fair often involves advocacy, and being friendly is just plain, common sense. It is a tremendous advantage to practice in a community where there is a sense of fairness and friendliness between counsel. It contributes to settlement negotiations. By the same token, it is a great disadvantage to practice in an area where there is an attitude of distrust between counsel on both sides.

This attitude can be described as a knife which cuts both ways. The defense lawyer who is predisposed to consider all claims fraudulent, all plaintiff's attorneys unrealistic on the one hand, or the plaintiff's lawyer who is emotionally involved in every case so that he can only see things one way, or feels that every insurance carrier is out to destroy every claim by unfair means, are both frustrating many settlements.

Seven Factors in the Evaluation Process

The evaluation itself—the hard-headed, detached look at the case from both sides, in order to arrive at a settlement value, requires consideration of a number of factors. Seven of those factors will be discussed.

1. *Juries.*

Since the ultimate determiner of settlement value is the jury, it is necessary to determine what juries are doing in your particular area. There are a number of ways to find out what juries are doing. One starts with the assumption that the identical case will have different values in a small rural community, in a medium-sized city like Columbus, Ohio, and in the very large metropolitan centers on the east and west Coast.

"Statewide Jury Verdicts" (published in Cleveland, Ohio) is used in many areas to follow jury verdicts. Its reports, which give brief descriptions of the accident, the injuries, the special damages and the jury results, have proven helpful in some areas. Then, in order to find out what juries are doing, it is suggested that one be a good listener. Active trial lawyers should be questioned respecting their results before local juries. After removing the normal amount of puffing, in which all trial lawyers engage, one is able to obtain a reasonably good idea as to how juries are reacting. As one example, in our area this type of questioning reveals that the trend is running somewhat against the rear-end collision cases and the value being placed on injuries-to-the-neck in this type of case to

the jury. By being a good listener, one is able to obtain certain guides in these areas.

While not directly pertinent to the jury determination, it is suggested that cases be evaluated with one's associates. It seems impossible to prevent blind spots occurring in individual cases. Using other trial lawyers as your jury will often reveal those blind spots and will assist in arriving at a more reasonable valuation of a given claim. Plaintiff's lawyers, who frequently are individual practitioners, particularly need to test their judgment against the advice of other trial attorneys. On the defense side, counsel in the home office serve the same purpose in reflecting their judgment against the judgment of the individual trial lawyer.

2. *Liability.*

This is No. 1 in any settlement formula. Horrible injuries and no liability equal an obvious zero verdict. And there isn't much difficulty in the cases with either clear-liability or no-liability, but in analyzing the liability factor, it is necessary, not only to determine the question of liability, but its form. All must be familiar with a case where the liability was clear and yet the verdict was disproportionately low. Why? Simply because the jury probably thought of the defendant as being only technically liable. Examples of this situation are the-slight-bump-from-the-rear, the-excusable-negligence, the-slip-on-the-floor—in other words, the defendant that is just over the fence on the question of liability as opposed to the defendant, on the other hand, who is close to being wantonly negligent; this is a real factor with respect to its impact on the settlement value.

3. *The Parties.*

An analysis of the parties, of the principal actors in the drama of the court room, is of the utmost importance. Plaintiffs fall into a number of categories, recognizable to all trial lawyers. Different factors control the elderly—the very young—the housewife—the wage-earner—the corporate executive—the professional man—the complainer or arrogant individual—the sympathetic person—the kind, and the honest. You cannot eliminate a single consideration in determining the impact of each of the parties upon the jury.

Of course, both sides must do it. From the moment the trial starts, the jury is watching both of the parties and their counsel, and *their* evaluation will be directly reflected in the verdict. If the client makes the trial lawyer feel uncomfortable, it is safe to assume that the jury is going to have the same reaction. At that point, beware!

The ideal client is an outgoing, friendly, reasonable person. If he is the plaintiff, he doesn't overplay his story of the injuries and, if the defendant, doesn't overplay the story of how the accident occurred.

In evaluating the defendant, the same factors apply but with certain variations. Assume the same factual situation, the same factors on liability, the same plaintiff, and simply substitute two different defendants. Assume that the first defendant is a young wage-earner who is struggling to make a living and is married with two children. In a close-liability situation, one might well expect a defense verdict in this case. Now, substitute instead, as the defendant, a taxi-cab company. Trial counsel representing this defendant, with all other facts being the same, might well be faced with a substantial verdict. Why is this true? The jury is simply reacting and making its evaluation of the party sitting in the court room. This evaluation affects, not only the issue as to how the liability situation will be determined, but it also affects the amount of dollars that a jury will award.

When you consider types of defendants, you must consider whether the defendant is a sympathetic individual, a wage-earner, a professional person, a wealthy or arrogant individual. Certain of these persons are at a definite disadvantage, and this must be reflected in your evaluation. In analyzing the corporate defendant, the evaluation depends upon the individual company, its status in the community, and its sympathy or lack of sympathy from a jury. As an example, one could anticipate different results with two bus-company defendants in the same type of accident. A jury will react differently to the bus operator by the local Council of Retarded Children, a non-profit corporation, and driven by the mother of one of the retarded children, on the one hand, as opposed to the bus operated by a large interstate carrier. These two defendants will not get the same treatment from a jury.

4. *Coverage Questions.*

Coverage problems can never be ignored and often pose very difficult situations. If one assumes a $5,000.00 policy with little

or no assets in the individual defendant, there is immediately placed a maximum value regardless of the injuries or the special damages. Efforts to determine coverage are in some cases controlled by state law, in some cases by rule of court, and in many cases controlled by insurance company policy. In some situations, it is controlled by the trust or lack of trust between lawyers for opposing sides. All of these factors influence whether or not a disclosure regarding coverage is made. There are many coverage questions. The only purpose here is to point out that the problem must be considered. Plaintiff's counsel is often at a handicap in this situation in analyzing the problem. A full disclosure by counsel frequently contributes to a settlement which otherwise would have been impossible.

5. *Special Damages.*

A list of damages reminds one of the saying: "Figures don't lie but liars figure." The special damages must have been incurred, be reasonable, and be subject to proof in court. In addition, they involve the great intangible factor of their impact upon a jury. It is easy to overlook the obvious in evaluating the special damages. For example, let us consider a female plaintiff who has a slight bump to the rear of her automobile without damage to her automobile. She has vague complaints regarding her neck and goes to her doctor at a charge of $5.00 per visit, twice in a week for two and one-half years up until the time of trial—has a special damage item of about $1,000.00. It is submitted that this amount cannot possibly be used in the settlement evaluation. If such a claim is made in trial, it usually boomerangs and, even in a clear liability situation, can sometimes result in a defense verdict. The jury may well feel that the plaintiff is overreaching and react against her cause.

The applicable law of damages must be considered in order to determine its effect on the computation of special damages. The problems are numerous in this area and must be evaluated. For example, what is the effect of workmen's compensation payments? Can they be introduced in court?—the implications of the person's own hospital bills, medical insurance, unpaid bills, services rendered without a bill being submitted, and bills incurred by a third person. It must be determined whether each damage item is provable in court; otherwise, it cannot be used as a factor in the settlement negotiations.

6. *Nature of the Injuries.*

In the over-all settlement evaluation, problems respecting the nature of the injuries become quite complicated. While the list with its variations is endless, there are six points which always must be considered.

(1) The type of injuries involved must be considered. Certain types of injuries have a far greater impact on juries. For example, a plaintiff with a deformed-foot injury, which can be observed in the court room, has a far greater impact on a jury than does a healthy-appearing plaintiff whose doctors describe a permanent injury which cannot be seen.

(2) Almost as a sub-heading under the first topic is a consideration of pre-existing conditions. It involves a very detailed analysis of the medical proof. Plaintiff's counsel are sometimes apt to overvalue their cases in not realizing the impact of pre-existing conditions on a jury. The jury reacts somewhat in this way: "Is this fellow really trying to get something-for-nothing, since he already had the condition anyway?" It is a delicate problem which cuts both ways. For example, if the plaintiff had a pre-existing condition but was able to work and the subsequent injury causes a total disability, the impact of the pre-existing condition may be minimized.

(3) Permanency—or, stated another way, a plaintiff who has recovered, has little appeal to a jury; but the plaintiff with a permanent condition, which can be observed by the jury, has an obvious effect on the jury.

(4) Pain-and-suffering are extremely difficult to evaluate but must be considered in determining value.

(5) Also, one must consider the "horrible factors", if any, involved in the injury situation. The individual who is pinned in his vehicle, realizing that he has severe injuries, will have a far greater effect upon a jury when it assesses damages, than will another person with the same injuries but without the other qualifying conditions.

(6) The character of the expert witness must also be considered. One must

consider the ability of the doctor to testify. In other words, is the doctor an effective medical witness? Will he sound convincing to the jury, or, on the other hand, will the doctor tend to antagonize the jury?

7. *Evaluation of Counsel.*

It reminds one of the saying: "The play's the thing". An entire Advocacy Institute at the University of Michigan dealt with this problem. And, at that meeting, psychologists argued, and rather convincingly, that in the last analysis trial lawyers are legally trained actors. Have you ever thought of yourself as an actor? Well, you are!

In the court room the lawyer is on the stage from the beginning of the trial, as are the parties themselves. The impact each of the trial adversaries will have, in many cases, will be a substantial factor in the settlement picture. Each side evaluates the confidence of his adversary, his preparation or lack of preparation, and his ability as an "actor" in the court room. A trial lawyer who fails in this category tends to downgrade his case.

Conduct Of Negotiations

Turning from the factors in evaluation, one comes to the inevitable question as to how the settlement negotiations themselves are conducted. This is an individual problem but, again, there are some guides.

1. The atmosphere for the negotiations becomes of some importance. A lawyer who does not sincerely believe the position that he takes, either on behalf of the plaintiff or of the defendant, reflects that attitude in the settlement negotiations. Firmness, sincerity, and honesty are suggested as guideposts. They are very simple to state, but very hard to apply.

As has been previously pointed out, the attorney is an advocate. How he proceeds is important, but he is an advocate. Neither side can expect his adversary to give his case away, to undersell, nor, on the other hand, to overvalue.

In creating the atmosphere for negotiation, the questions arise: Who makes the first offer? Who goes to whose office? The response to these questions is: Who makes the first offer?—No difference. Who goes to whose office?—No difference. Any lawyer should be willing to go to the other fellow's office in the hope of working out a settlement. Parenthetically, it should also be stated that both sides should be approached with dignity.

Actually, there is a great fallacy in waiting. Settlements take time and the larger the amount involved, the more complicated the factors, the more time that is involved. Since all trial lawyers face deadlines, delay in starting negotiations creates a problem in working out successful settlements.

2. Then, one comes to the problem in negotiations respecting the submission of proof by plaintiff's counsel. It has been suggested that the plaintiff has a product to sell and, if he is going to sell that product, he must submit the proof to the other side. A submission of proof, however, involves careful preparation of the special damages, keeping in mind the factors that were discussed in connection with the submission of provable special damages.

3. In the conduct of negotiations, one of the most difficult problems is the exchange of proposals. After all of the factors have been utilized in arriving at what has been described as the educated guess, there is the problem on both sides of arriving at a specific proposal.

If a ridiculous demand is made, the settlement negotiations are soon at a standstill. There is no band or area in which the parties can negotiate. Of course, it must be realized that there is no definitive analysis even after a careful consideration of all of the factors pertaining to the case. It is merely the arrival at an area or range-of-value in which the particular case should be settled—a reflection of all of the factors which have formerly been discussed. On the defense side, it has been described as what the defense would pay in order not to have this question raised by the jury or determined by it.

Here, again, the determination as to whether there will be a reasonable disclosure of settlement demands and offers goes directly to the attitude each has toward his adversary. If an adversary can be trusted, the chances of a reasonable disclosure are greatly enhanced. An attorney with a record of reasonableness and fairness has the best quarantee of successful negotiations.

4. There are, of course, times when all efforts directed toward successful negotiations between counsel have failed. At that point it is often possible to make successful use of the court. In the case that comes to pre-trial or to the court room, there are numerous instances where the trial judge

can give real assistance. There is an honest difference between the parties, and the question inevitably arises in counsel's mind as to whether an attempt should be made to use the court. Of course, there are many cases where the court can be used intelligently to effect a settlement, *but* the court *must* act intelligently. It must use its power, *not* as a sledge hammer in order to effect a settlement simply for the sake of terminating a litigation, but *rather* to bring both parties to the area where the case can be reasonably settled.

In order for a judge to act intelligently, full disclosure by both counsel must be made. Further, a settlement can be accomplished in this area only where there is a reasonable difference between the parties.

Conclusion

When all is said and done, the trial lawyer, while aiming for a settlement in every case, must buttress his position by a willingness to go to trial rather than retreat from what is a reasonable settlement evaluation. But, before making that stand, he must come to the reasonable position first.

Settlement negotiations are not easy. They involve many problems. Effecting a settlement, however, not only serves the litigants, but also assists the courts and the public. With court congestion ever increasing, with pressures being brought to bear by both sides, and with the tremendous hardships that are sometimes incurred by bizarre jury verdicts, it is a real continuing challenge to all trial lawyers.

How Can We Improve The Handling Of Automobile Claims And Litigation?*

LEWIS C. RYAN
Syracuse, New York

THE question posed today "HOW CAN WE IMPROVE THE HANDLING OF AUTOMOBILE CLAIMS AND LITIGATION" is certainly one upon which the trial bar of the country should immediately and continuously focus its attention. Of importance to our particular group is the kindred problem—"How can we prevent the removal of automobile litigation from the courts?" For if the commissioner is to replace the judge and the sole issue in a personal injury case be only how much is to be paid—and this determined by referring to a schedule—then the question posed for discussion pales into insignificance.

LEWIS C. RYAN at the time of his death on May 10, 1961 was president of the Defense Research Institute, Inc. President of the New York State Bar Association in 1945, president of the American College of Trial Lawyers in 1957-58, member of the Board of Governors of the American Bar Association in 1960, trustee of Syracuse University and Chairman of the Board of Directors of the Syracuse University Research Corporation were but a few of his numerous activities.

COURT CONGESTION

To those of you who practice where court congestion does not exist and where substantial increases in the cost of automobile insurance have not yet occurred, the threat of automobile compensation probably seems not only remote but impossible of attainment. However, the fact of the matter is that it is neither remote nor impossible.

The problem of court congestion in our large metropolitan centers becomes more serious day by day and the bench and bar seem unable or unwilling to alleviate it and thereby dispel one of the chief criticisms of our present system. The final result may be a movement on the part of editors, teachers and motorists, discouraged by our lack of cooperative effort and ineptness, to insist upon new procedures which they, rather than the bar, will select. I would emphasize that court congestion, no matter where it is concentrated, is a problem for ALL lawyers, for it creates bad public relations, leads to a desire for change, and to attempted solutions of the absolute liability and automobile compensation variety.

AUTOMOBILE COMPENSATION

I need hardly tell you that in California, Governor Brown's researcher is still studying the compensation plan in anticipation of a final recommendation. The Yale Law School group is scheduled to report to the Connecticut legislature on a similar proposal and it is generally known that its leading tort professor is already committed to automobile compensation. Early this year an automobile compensation bill was introduced in the New York legislature at the specific request of one of the most powerful political leaders in the state. A distinguished law professor in his recent book on "Automobile Products Liability" has recommended a plan to compensate all victims of accidents due to defects in motor vehicles regardless of fault. It has been said that not one prominent tort professor in the country has opposed automobile compensation. In any event, the danger is a clear and present one and the signs are, indeed, ominous. They indicate most clearly that the time has arrived for the ORGANIZED bar as a committee of the whole to meet head-on this very serious threat. We must raise our own voices—loud and clear—so that we can be heard by all. It is well for the bar generally to remember that imagina-

* (Editor's Note: This paper was prepared by Mr. Ryan for delivery at the St. Louis meeting of the ABA, August 1961. It was read by Arthur Agan, a member of the firm of Hancock, Dorr, Ryan & Shove and a long-time associate.)

tive and skilled trial men may quickly invade and master other specialized areas of the law should a compensation plan be adopted.

The Negligence Bar

It is probably correct to say that the negligence bar "never had it so good"—and that goes for those who represent both plaintiffs and defendants. Probably it will be still better because we can expect during the next decade a further population bulge which means more automobiles, more accidents, more injuries and more claims. Therefore, it is understandable why the negligence bar is complacent and why it fails to recognize the additional burdens which more accidents and more claims will place upon the American motorist and our national economy. It seems the premium paying motorist needs a champion and the most alluring job I can imagine would be that of organizer of the American Federation of Motorists. The motorist cannot go on idefinitely paying higher and higher insurance premiums.

By way of illustration, a New York City lawyer, who now spends $90 a month for insurance and garage rent, recently announced that he was about to become a pedestrian. The young men of Brooklyn who now pay $400 a year for minimum limits on their small cars are justified in protesting. Curiously enough, if insurance costs continue to increase, it may alleviate court congestion because the only cars left on the highways will be those of business corporations whose owners can pass on the cost to the ultimate consumer of their products.

Concern over the increasing cost of automobile insurance is now rapidly spreading. Lay groups have been organized in several states to resist increases. A few months ago the Chamber of Commerce of the State of Pennsylvania launched an advertising campaign to arouse the public over a situation allegedly existing in several counties of the state. This resulted in the plaintiffs' bar attacking the program in open court with a request that their cases go over the term because placards displayed in buses stated that jury awards were responsible for increased insurance costs.

A very disturbing development occurred when Life Magazine got into the act in its issue of March 31, 1961. It said: "One reason for the tremendous cost of automobile liability insurance in New York City, for example, is the fact that the city has a few crooked lawyers who, if your car is so much as nudged by Mr. Anderson's, will be happy to furnish you (1) a crooked garage man who will testify that your car was damaged to the extent of $950, and (2) a crooked doctor who will testify that your neck has been put permanently out of commission by a whiplash injury, thus enabling you to sue Mr. Anderson for a quarter of a million dollars."

A casual reading of other editorial comment, particularly in the papers published in rural areas, will demonstrate a grass roots resentment of fraudulent claims, excessive verdicts and increased premium cost. This may easily develop into a ground swell.

Despite this mounting wave of criticism from the public, the plaintiffs' bar expands its nationwide program for legislative changes to take away statutory defenses, organizes splinter bar associations which compete with state and local associations and hacks away for more and more "More Adequate Awards." Its announced purpose of "comforting the afflicted and afflicting the comfortable" has, regardless of how estimable its intentions may be, resulted in vastly increased claim consciousness and claim frequency and rising costs even in the rural areas of the country. Authors of books in the tort field have left their offices to sponsor and participate in medical and legal seminars across the country and have—perhaps unintentionally—educated young practitioners in the art of exaggeration and invention of injuries.

A law book publisher in an effort to sell its books has seen fit to alter the format of its monthly newsletter of court decisions so as now to report large out-of-court settlements with the names of the lawyers who obtained them. Another publisher, equally unmindful of the public interest, has added to its enticing sales pitch the advocacy of the use of the blackboard technique for pain and suffering with such citations as it could uncover to support it.

What The Pubic Is Hearing

A prominent Miami medical specialist is now charging in public speeches that the Dade County automobile insurance rates are three times those of the rest of Florida because Miami has "a faked injury racket." In one of his recent speeches he said this situation is costing the citizens of the county millions of dollars each year and

that it directly affects the whole economy and future of the country. He added that the legal expense involved is "astronomical, exorbitant and outrageous." He summarizes his criticism by saying that "the public is sitting idly by and taking a shellacking."

Coincidental with these developments, the public hears that a substantial number of lawyers and doctors under investigation in the judicial inquiry in Brooklyn have taken the Fifth Amendment and flatly refused to answer questions or produce their records. This small segment of the negligence bar has brought into disrepute the entire profession on our present system of handling tort cases. By its silence the entire negligence bar has, in the minds of the public, condoned their conduct.

Claim Consciousness

What contributes to claim consciousness? The average member of the public who reads the newspapers is made aware of large money demands being made by their neighbors for relatively minor injuries. This—because the plaintiffs' bar loves a high *ad damnum* clause rather than one within reason. Some of these readers have learned that the money recovered represents "tax free" dollars. Many conclude that these large money demands are paid by these impersonal corporations. Hence, when they become claimants, they have exaggerated ideas as to the actual value of their cases. Beyond this, many are becoming conversant with the causes and symptoms of such household words as whiplash, post-traumatic syndrome and slipped disk, and such psychic injuries will continue to increase.

It is time for critical examination of tactics in personal injury cases with public interest being given a high priority. We are rapidly reaching the limit of the premium payers ability to pay or his willingness to do so. For example—the most successful expert in combatting juvenile delinquency in New York City said recently in a public address that his program had been seriously impaired because many of the playgrounds had been closed by municipal authorities. He stated that exorbitant cost of insurance protection precipitated this action.

Another area in which cost may adversely affect the public interest is in the malpractice field where some medical practitioners and hospitals are already becoming reluctant to take full advantage of the use of our new miracle drugs.

The Changing Times

We intend to ignore the fact that in the short period of time since the end of World War II tremendous changes have occurred throughout the world. Empires have collapsed. Substantial shifting in the balance of power in world affairs has occurred. In our own country, we have had to discard our theories of military strategy that won the war and we are striving mightily to now hold our own in the space age. We have drastically revised our racial relations and our industrial and labor relations. In fact, we have jammed into a few years the changes usually wrought in a century. We have done so because we have had to do so.

This need for rapid change has been recognized by our statesmen, our military men, our doctors and our economists. In the face of these developments, the lawyers seemingly have decided to preserve the status quo come hell or high water. Hence any proposals to modernize or streamline our courts, to speed up the judicial process or to increase our productivity and reduce costs, are either ignored or resisted by us and not even minor recommendations seem to have a Chinaman's chance of being enacted into law.

Suggestions For Improving The Situation

All these and other developments make timely the inquiry today as to how we may improve the situation. To me the following activities should be seriously considered:

1. First of all, the negligence bar should unite in a concerted all out attack on court congestion. Many devices already have been attempted but with little success. However, there is still another device which never has been fully explored. It has, in my opinion, great merit. It is based on two known factors (1) about 95 percent of all suits in metropolitan areas are settled without a trial but usually not until the eve of trial, and (2) a third of all the suits on the general calendars of our highest trial courts are really of inferior court quality and never in the first instance should have been on the calendars. This was clearly established in New York City by an actual settlement count.

Therefore, the problem becomes one merely (1) of advancing the date of the settlements and (2) of divesting the calendars of nuisance cases.

It is my considered judgment that these two objectives could be obtained by a prop-

er mandatory pre-trial and classification of the cases by an experienced judge or special master. Counsel would be compelled to complete all motions and other preliminaries within ninety days after the case was at issue. Immediately thereafter, the case would be pre-tried. If it was not settled, it would then be classified and all nuisance cases sent to the court where they belong. The system would have the further great advantage of bringing counsel together at an early date, the plaintiffs afforded an opportunity to get their money and the insurance companies an opportunity to take down their reserves. In my opinion, 20 percent of all the cases would be settled and another 20 percent would be transferred to a lower court. If the influx of new cases was thereby reduced by 40 percent, it would be a short time indeed before congestion vanished.

2. We should refrain from making unnecessary motions which are time-consuming for the bench and bar and costly to our clients. We should work for a system under which, in important litigation, all motions are made and continued before a particular judge who stays with the case from start to finish.

3. We must take greater interest in the selection of judges so that more of them will be chosen from the trial bar which is mandatory in England. Obviously, a trial judge cannot learn the art of conducting and expediting a trial by merely putting on a robe.

4. We should unite to assist the courts in disciplining the small segment of the profession which long has been guilty of unethical and criminal conduct instead of rushing to their defense as we seemingly do.

5. We should assist the medical profession to remove chronic offenders from its ranks. It's a well known fact that certain doctors take advantage of the medical payments coverage by protracted and unnecessary treatment for accident victims. This not only increases medical payment premiums but many times results in increased verdicts in the trial of the action. This double barrelled invitation to larceny is much too difficult for some doctors to resist.

6. The negligence bar should discourage the undue publicity seekers in our profession. Many lawyers call the local newspapers reporting their victories. Often, the newspaper version is inaccurate and misleading, tending to indicate large verdicts for comparatively minor injuries. This increases claim consciousness in the public generally.

7. We can and should give earnest consideration to the wisdom of assessing the expenses of a trial against a plaintiff making an unreasonable demand or a defendant making an unrealistic offer. A similar system has helped to eliminate court congestion in England and might well be a partial answer to the problem of congestion here.

8. We should bring to an abrupt halt the nationwide chipping away campaign for absolute liability which requires the defendant to respond in damages when he has done no wrong and is free from blame. Such a program inevitably will lead to the complete abandonment of the concept of fault and the adversary system as we know it today.

9. We should not permit the cost of automobile insurance for the average motorist to become so prohibitive as to cause a public upheaval and kill the goose that laid the golden egg.

Finally, let us unite in the public interest to retain our precious system of trial by jury in tort litigation. Let us not acquiesce in our own painless extinction unless we are willing to admit that it would be in the public interest. Since we would reject the validity of such a contention, then let us make no mistake in underestimating the major rescue operation required for our survival. The verdict of the American people on this important issue will rest in a large measure on our performance in expediting trials and in our ability to control the cost of insurance protection which now in many states, unlike other coverages, motorists are legally compelled to provide. It is a challenge worthy of the most responsible and intelligent leadership available.

A golfer drove into the rough. He took a careful stance and a healthy swing. He missed the ball and hit an ant hill killing a thousand ants. He swung again and missed the ball a second time. As he was about to swing a third time, there were only two ants left. One said to the other, "If we want to survive, we'd better get on the ball."

The Impartial Medical Testimony Project*

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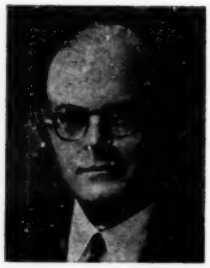
IN the limited time at my disposal, I am going to confine my discussion to the Impartial Medical Testimony Project with which I have had some experience, namely, the one provided for by the special rule for medical examinations in personal injury actions now in force in the Supreme Court of the State of New York for the Counties of New York and the Bronx under rule of the Appellate Division, First Department. For an excellent discussion of a similar project see an article by Wilma I. Baran in the Temple Law Quarterly, Volume 32, No. 2 Winter 1959, pertaining to the practice in the Federal District Court for the Eastern District of Pennsylvania. From the thoughtful recent volume, "Call the Doctor," I quote:

> Medical evidence delivered in our courts of law has of late become a public scandal and a professional dishonour. The Bar delights to sneer at and ridicule it; the judge on the bench solomnly rebukes it; and the public stand by in amazement; and honourably minded members of our profession are ashamed of it . . . What is the public to think when, for example, they see three doctors on one side swearing on behalf of a railway company that the plaintiff is not suffering from any injury at all; and three on the other side swearing that he is not only suffering from an injury but is seriously damaged and probably for life?[1]

This language is from an article in the British Medical Journal dated May 2, 1863. I think it is fair to state that ever since that time the problems created by biased medical controversy has haunted the courts particularly in the field of negligence litigation. One of our most respected judicial students Justice Francis Bergan, who is the presiding justice of the Appellate Division, Third Department at Albany, said in the *Del Ra* case:

> The general trend of the practice in personal injury cases is to attempt to narrow down the areas of medical dispute, and the aim is, ultimately, with the assistance of the medical profession, to eliminate most of the controversy on the medical side of personal injury cases.[2]



WILLIAM F. MARTIN *is a member of the firm of Martin, Clearwater & Bell. He received his preparatory education at Manhattan College and his legal education at the Columbia Law School where he obtained his LL.B. in 1928. He is a member of the International Association of Insurance Counsel, The Association of the Bar of the City of New York, New York County Lawyers Association, New York State and American Bar Associations, Brooklyn-Manhattan Trial Counsel Association, and is a Fellow of the American College of Trial Lawyers.*

HISTORY AND PURPOSE OF THE PROJECT

After much thoughtful preparation in 1952 and 1953, a committee of the Association of the Bar of the City of New York, acting under the inspired promptings of the then presiding Justice David Peck, and with the cooperation of the Academy of Medicine of the City of New York, the New York County Medical Society, the Bronx County Medical Society, the New York County Lawyers Association and the Bronx County Bar Association worked out the Impartial Medical Testimony Project for use at first in New York County, and shortly thereafter its use was extended to Bronx County. The funds for the project were furnished by the Sloan and Ford Foundations. After a period of time had shown that the plan was helpful, the assistance of the Foundations was no longer sought, and the expenses of the project became a part of the court budget. The project is summarized in a court ruling which reads as follows:

*An address given at the American Medical Association's Medical-Legal Conference at New York City on April 29, 1961.

[1]Turner, E. S., CALL THE DOCTOR, St. Martin's Press Inc., 1959, p. 205.

[2]Julis A. Del Ra v. Eva M. Vaughan, 2 App. Div. 2d, p. 156 at p. 157.

Special Rule for Medical Examinations in Personal Injury Actions.

1. In any personal injury case in which, prior to the trial thereof, a justice shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties, order such examination and report, without cost to the parties, through the Medical Report Office of the Supreme Court, New York County. The examination will be made by a member of a panel of examining physicians designated for their particular qualifications by the New York Academy of Medicine. Copies of the report of the examining physician will be made available by the clerk of the Medical Report office to all parties.

2. If the case proceeds to trial after such examination and report, either party may call the examining physician as a witness or the trial justice may, if he deems it desirable to do so, call the examining physician as a witness for the court, subject to questioning by any party, but without cost to any party.[3]

Existing Abuses Of Medical Testimony

At about the time of the adoption of the ruling, the Appellate Division, First Department, called attention in a number of cases to the abuses of medical testimony that were found present in cases that had been reviewed in the court. In the case of *Dennison v. Wing*, decided March 11, 1952, the court had occasion to review a $45,000.00 verdict which could be sustained, and I quote:

> Only upon the assumption that the jury found, and could reasonably find, that a breast cancer suffered by plaintiff ending in radical surgery and removal of the breast, resulted from the accident. * * * Plaintiff's contention that the accident was the cause of the breast cancer was championed by a single expert witness, neither a breast nor cancer specialist, who was first consulted the night before he was called to testify, solely for the purpose of enlisting his testimony. He had no knowledge of plaintiff's injuries or cancer except as recited in a hypothetical question. Neither the doctor who attended the plaintiff during her hospital confinement after the accident nor the doctor who subsequently treated her for her injuries was asked any question respecting the possible connection between the accident injuries and the breast cancer. Nor was the doctor who performed the breast operation called.
>
> The medical expert called by the defendants challenged the thesis that trauma could produce a cancer of the breast. ***
>
> We are satisfied that the breast cancer from which plaintiff unfortunately suffered was not caused by the accident. Ruling the cancer out of consideration, a generous allowable recovery would be $10,000.00 to the plaintiff and $1,000 to the husband for loss of services in addition to the $1,000 awarded him for his own injury. ***
>
> A word should be said about any new trial, in the event than plaintiffs should elect not to stipulate to a reduction of the judgment and decide to press their claim that the cancer was caused by the accident. Plaintiffs should be expected in that event to have the doctors who observed and treated plaintiff wife after her accident give such testimony as they might be able and qualified to give as to whether the injuries which they observed could have caused the cancer in the location in which it developed. The surgeon who performed the breast operation should be called for such relevent testimony as he might give, and one or more recognized authorities on breast cancer should be called.[4]

There is not a lawyer in this room with any experience in the trial of negligence cases who has not seen absolutely irreconcilable positions taken by expert witnesses in the trial of personal injury cases. In the last year or so I have seen such witnesses testify that an accident can produce leukemia, cancer or diabetic retinitis. I talked with the foreman of a jury who was shocked to hear two apparently well-qualified cardiologists give entirely different interpretations of the same electrocardiogram. There is a school of thought represented by many of the plaintiffs bar who agree with Thomas F. Lambert, the editor of the NACCA Law Journal, that "as long as there remain substantial differences of medical opinion,

[3]Special Rule for Medical Examinations in Personal Injury Actions New York County Supreme Court, Bronx County Supreme Court Rules.

[4]Dennison v. Wing, 279 App. Div. 494.

there is no alternative to entrusting them to a jury," or as expressed by a Tennessee judge:

> In short, so long as a reputable doctor testifies to at least a probable medical relationship, the court will refuse on appeal to overturn an award in favor of the victim, unless it is "contrary to common sense" and courts on appeal properly hesitate to say any medical theory propounded by a reputable, licensed medical practitioner is patently absurd.[5]

Criticisms Of The Project

Lambert and others are very critical of the Impartial Testimony Project because he says that "Uncertainty is inevitable in many areas of traumatic medicine." I have heard one of our distinguished plaintiff's lawyers say that the plaintiff should be able to call an expert who believes in one school of thought even if he is in the minority, and that it is unfair to introduce the impartial expert who favors the majority school of thought. He feels that the adversary system should allow for the dispute to be resolved only by a jury. To put it bluntly, he feels that if one hundred leading cancer specialists feel that a trauma cannot cause cancer, and if one doctor thinks that it can, he should be allowed to attempt to persuade the jury to the latter belief. If the cause of a disease is not known, it is argued that a plaintiff's expert should be permitted to surmise that perhaps a trauma could have caused it. In this connection I would particularly like to invite your attention to the scholarly decision of Judge John Van Voorhis of the Court of Appeals in the case of *Miller v. National Cabinet Company,* decided in July, 1960, where he discusses the whole question of speculative medical testimony. Particularly pertinent are his observations that:

> General expressions of opinion in relation to cause and effect are permitted to a medical witness only where they are directed to showing the condition of the particular plaintiff or claimant was such as to indicate that it was occasioned by the injury or injurious exposure claimed. *** Not every supposition of a witness concerning what might be has the force of evidence, even though he has been licensed to practice medicine. If the witness is unfamiliar with any statistical data in the medical literature or in his own practice to give an inkling either to himself or to the court or board of how high the incidence of these cases is in situations of this kind then the doctor's assumption that it is "quite high" is without significance. *** It is not customary, to be sure, to hold doctors to the strictness in testifying that was once required provided that it can be perceived that they are testifying with some reasonable degree of medical certainty. The form of the answers is less important than the context and background. Nevertheless, there must be some evidence of a basis for the oponion, and the acceptance in one case of the "possible" as meaning reasonable medical certainty does not justify treating every "possibility" as though it were enough to establish the facts sought to be proved. In the training of a scientist anything conceivable is a possibility. That is the first tenent accepted by the scientific mind. Many of the scientific discoveries and applied technologies today would have been impossible of attainment less than a generation ago. No trained scientist, medical or other, would have the effrontery to state today that space travel is impossible, that the discovery of a cure for leukemia or other forms of cancer is impossible, or that any other speculation is dogmatically beyond the realm of knowledge or accomplishment. Still that would not justify a court in assuming that it is presently known or is presently achievable merely for the reason that a trained scientist has said that it is not impossible.[6]

Value Of Objective Testimony By An Impartial Expert

It is the objective testimony of the impartial expert, who has no reason to dissemble, that is most valuable. A practical instance of this was furnished in a case that came on before Judge Aurelio in New York, and I quote from the Judge's opinion, the report of the impartial expert:

> It is my opinion that there is little doubt regarding the diagnosis of Dupuytren's disease of the left palm. The difficult question is whether this condition has any relation to the accident of April 27, 1955. The answer to this question is rendered

[5]Boyd v. Young 245 S.W.2d 10 (Tenn.).

[6]Miller v. National Cabinet Company, 8 N.Y.2d 277.

more difficult by the divergence of opinion among medical men regarding the etiology of Dupuytren's disease. Dupuytren, himself, who described the condition in 1932, considered that it was due to the trauma of manual labor. This was also the view of Cooper who ten years previously described the condition. Since then, however, other authorities have pointed out that the condition develops in individuals who have had no exposure to traumatisms. An opposing school has therefore arisen which holds that the disease is caused by a constitutional peculiarity which in many instances is found to be familial. A reconciliation of the two opposing views has been attempted by some writers who think that there is a combination of trauma and of an inherent peculiarity of the tissues.

In trying to reach a fair decision in the case of Miss Sullivan, certain facts have to be emphasized. These are (1) that she had no abnormalities of the left hand before the accident, (2) that she struck not only the nose but also the left hand in her fall, (3) the left hand was markedly swollen for a period of several weeks, (4) on subsidence of the swelling the nodules in the palm were noted and she was referred to the St. Luke's Orthopedic Clinic in August 1955 and (5) since that time she has been troubled by stiffness of the left hand and inability to use the left hand in normal fashion.

Taking these definite facts into consideration and considering the generally accepted theory that trauma in many cases must be considered an etiological factor, I conclude that the accident of April 1955 is in part responsible for the present condition of the left hand.

It may be argued that repeated traumata are necessary to produce Dupuytren's disease. There are, however, cases on record in which a single accident has been considered responsible for the condition. Such cases are reported by Tord Skoog Acta Chirurgicia Scandinavica, Vol. 96, Supplementum 139, page 113.[7]

The Panel Of Experts

The panel of experts selected for the impartial project is carefully supervised by the Academy of Medicine. Judges and lawyers have nothing to do with the decision as to who shall be placed on it. There is a rotation of names so that no one is called on too often. All selected have excellent backgrounds and have not acquired any reputation as either plaintiff or defendant witnesses. They are men who, on the whole, in the past have been reluctant to testify in lawsuits because of their previous experiences. They feel a good deal of their time will be wasted, and/or they will be subjected to abusive cross examination. They also resent the frequently voiced requests from lawyers that they assume a partisan role with respect to their testimony. They know when the Project seeks their services that they will receive a reasonable but not too generous stipend, and they will be treated with great consideration in arranging time for their appearances.

When the examination takes place they have been furnished with the medical reports of both parties and all relevant hospital records. They are not to be distracted by the presence of counsel during the examination and the patient is to fully cooperate with them and give a complete history.

The director of the original foundation project, Dr. Irving Wright of New York Hospital, found that by examining the first one hundred or so reports submitted, valuable information about the care of traumatic cases was obtained. Lessons in improved patient care were learned. Sometimes injuries of consequence that were not known to the plaintiff were found, and upon close examination the extent of the injuries was discovered. Many times diagnoses were found to have been based on inadequate x-rays and other types of reports.

Number Of Referrals

A report of the project from its initiation in New York County in January of 1953 and Bronx County in October of 1953 shows that 790 referrals were made and 752 examinations were actually held. The difference is accounted for by five that were postponed and thirty-three cases that were settled quickly after the examination was ordered. One of the cases was settled for a fraction of the demand almost immediately after the examination was ordered.

Value Of The Project

It is not the number of examinations alone that determines the value of this

[7]Sullivan v. Perez, et al, Supreme Court, New York County, Oct. 17, 1956 (not officially reported.)

project. It is the fact that the examination can be ordered that is so helpful in effecting a realistic appraisal of cases. Many partisan doctors have become wary of exposure. In the anonymity of New York City a doctor can usually testify to most anything and it would have to be extremely newsworthy for other doctors to hear about him. A doctor who has any claim to respectability at all and values his professional and hospital associations, does not wish to be found making untenable claims, and this is the risk he runs if the impartial expert reviews the situation.

The judge and attorneys must take the doctor who is next on the panel list, unless he has been a fact participant in the treatment of the particular litigant. A copy of his report goes to counsel for both sides. Any expert, retained by either side, who wishes to take a different position must be rather sure of his grounds. Of course there are situations where doctors have ligitimately differed with the impartial expert, and the impartial expert's view has not always been accepted, but the percentage is very high that it will be, and it is this percentage that leads certain members of the plaintiffs bar and occasionally a member of the defendants bar to bitterly protest the impartial testimony project on the grounds that it takes the element of a game of chance out of litigation. It is very hard for them to attack the motivation of the impartial expert, and I know of no judge who would stand for one of these experts being abused in court.

By the terms of the rule either counsel or the judge may call the impartial expert as a witness and he is identified to the jury as such. I should add here that if the expert needs further diagnostic study such as x-rays, he is permitted them and the fees for the same are paid. It is usual, when the impartial expert's report is received by the court official in charge, and sent to the judge, for the judge to call the parties in and have a conference before trial. Many cases are then settled.

Conclusion

Some thought is being given to ordering more examinations just prior to trial providing there is a real need for the same. Some flexibility here would be helpful, but the project must never be abused by being used in too routine a manner. The special committee of the Association of the Bar in 1956, issued a report the general conclusions of which are still considered to be sound:

1. The Project has improved the process of finding medical facts in litigated cases.
2. It has helped relieve court congestion.
3. It has had a wholesome prophylactic effect upon the formulation and presentation of medical testimony in court.
4. It has proved that the modest expenditure involved effects a larger saving and economy in court operations.
5. It has pointed the way to better diagnosis in the field of traumatic medicine. Unlike the others listed above, this accomplishment is an unexpected dividend, which was not in contemplation when the Project was initiated.[8]

Not only should the impartial medical testimony project receive wider acceptance, but the Federal Rule of Civil Procedure, Rule 35, subdivision (b) should be accepted. The Appellate Division of the Third Department stated in a case *James H. Rooney v. Curtis Colson* (3 App. Div., 2d, p. 410 at 412.):

> We are of the opinion, however, that in accordance with the modern trend toward full disclosure on both sides, the plaintiff should be required to give to the defendant a copy of the report of the examination by his physician or physicians, as a condition of his obtaining a copy of the report by the defendant's examining physician.

At least in this state we are far in advance of a state such as Illinois, which until quite recently, did not allow a defendant any examination of the plaintiff's injuries before trial.

May I say to the doctors who are in this audience that when called upon as witnesses, they are not to consider themselves as partisans or advocates, but as scientists who are giving their best impression of both their physical observation of the patient and their knowledge of the medical and surgical conditions under discussion.

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[8]Special Committee of the Association of the Bar of New York City, Impartial Medical Testimony, a report published by the Macmillan Co. p. 35 (1956).

Shifting Risks Through Insurance And "Hold-Harmless" Agreements

CHARLES F. BACHMANN
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THE unrelenting search for lower costs of doing business sometimes causes the alert proprietor to seek to shift some of his costs to others by the use of various types of "hold-harmless" clauses in the contracts he uses in carrying on his business.

The purpose of this discussion is to consider some of the problems associated with the use of these clauses other than those found in sidetrack,[1] equipment rental[2] and lease agreements.[3]

Judicial opinions as to the principles to be applied in the interpretation of these agreements run the gamut from strict to liberal with variations in between, depending upon the language used and the factual posture in which it is attempted to be applied. However, a great many courts pay lip service, at least, to the classic phrase that ". . . contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms."[4]

Others say that such construction ". . . must be required by clear and explicit language of the contract."[5] A federal court has held that "Under New York law, a person is not entitled to be indemnified against the liability to which his own active negligence contributed unless the contract expresses that intention beyond all doubt."[6] The text writers usually say that the rule of strict construction will generally be applied.[7]

Despite this, there are jurisdictions that have determined that a compensated indemnitor ". . . should *not* be able to assert the strict construction of the rule against the indemnitee."[8] Following the same line, the Massachusetts court says that such agreements ". . . are to be fairly and reasonably construed in order to ascertain the intentions of the parties and to effectuate the purpose sought to be accomplished."[9] A federal court in Michigan has stated that ". . . It is *not* necessary to use the word 'negligence' in order to express the intention."[10]

On the other hand, one judicial school of thought holds that recoupment for loss

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[1]Southern Pacific Co. v. Layman, 173 Or. 275, 145 P.2d 295 (1944); Booth Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9) Cir. 1950); Chicago Rock Island & Pacific Railroad Co. v. Dobry Flour Mills, Inc., 211 F. 2d 785 (10 Cir. 1954); Ryan Mercantile Co. v. Great Northern Railroad Co., 186 F. Supp. 660 (D. Mont. 1960); New York Central Railroad Co. v. General Motors Corp., 182 F. Supp. 273 (N. D. Ohio 1960).

[2]Martin v. American Optical Co., 184 F.2d 528 (5 Cir. 1950); Wade v. Park View, Inc., 25 N.J. Super. 433, 96 A.2d 450 (1953); Crowell v. Eastern Airlines, 240 N.C. 20, 81 S.E.2d 178 (1954); Dedol v. The Hallack & Howard Lumber Co., et al, 226 F.2d 526 (9 Cir. 1955); Simmons v. Columbus Venetian Stevens Buildings, Inc., 20 Ill. App.2d, 155 N.E.2d 372 (1958); Burns v. N. & L. Realty Corp., 160 F. Supp. 203 (W.D. Pa. 1958).

[3]George M. Brewster & Son v. Catalytic Construction Co., 17 N.J. 20, 109 A.2d 805 (1954); James Stewart & Co., Inc. v. H. B. Mobley, 282 S.W.2d 290, Tex. (1955); Bernardo v. Fordham Hoisting Equipment Co., et al, 6 A.D.2d 619, 180 N.Y.S.2d 525 (1958).

[4]Thompson-Starrett Co., Inc. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35, 37 (1936).

[5]County of Alameda v. Southern Pacific Co., et al, 4 Cal. Rptr. 807, 813 (1960); Cozzi v. Owens Corning Fiber Glass Corp., et al, 59 N.J. Super. 570, 158 A.2d 231, 234 (1960).

[6]Miller v. The Pensylvania Railroad Co., 236 F.2d 295, 298 (2 Cir. 1956).

[7]Annotation 175 A.L.R. 12, at page 144, Section 68.

[8]Emery v. Metzner, et al, 191 Pa. Super. 440, 156 A.2d 627, 631 (1959).

[9]New York, New Haven & Hartford Railroad Co. v. Walworth Co., 59 AS 1421 (Mass), 162 N.E.2d 789, 791 (1959).

[10]General Accident Fire & Life Assurance Corp., Ltd. v. Smith and Oby Co., 272 F.2d 581 (6 Cir. 1959).

caused by the indemnitee's negligence should be disallowed where the "talismanic" words are not contained in the agreement.[11] But, to the contrary, several recent cases can be found that allow indemnity for one's negligence even though words of general import are used to express such intent.[12]

Faced with such a contrariety of opinion, lawyers ought to heed the very frank language of the dissenting Justice in *Jordan v. The City of New York, et al*[13] when he said:

> The lawyers who specialize in this field are well aware that clauses such as those under consideration in this case demand laborious judicial parsing, in an effort to distill the intent of the parties. Surely, at this stage, it is not too much to require them to stop waging verbal duels and to state unmistakably whether or not a contract purports to burden the indemnitor with another's negligence.

The same sort of judicial annoyance at unclear clauses seems to underlie the following comment of the Chief Justice of the Supreme Court of New Mexico in *Metropolitan Paving Company, Inc. v. Gordon Herkenhoff & Associates, Inc.*:[14]

> I believe the "express negligence" rule is the better reasoned and fairer one, and is much less likely to result in dispute or litigation. There would be no interpretation problems if this rule were adopted. The question would simply be: Is the negligence of the indemnitee expressly referred to?

Examples—Indemnity Allowed

A clause that was regarded as clear and unequivocal by at least two courts is as follows:

> The Seller agrees to indemnify and hold harmless the Buyer from and against and to assume responsibility for all claims, loss or expense whatsoever growing out of the merchandise and services furnished hereunder, whether such claims, loss or expense are alleged to be caused or contributed to by any negligent act or omission of the Buyer or otherwise.[15]

Contracts with respect to furnishing labor and materials for the construction or repair of buildings, roads, bridges, etc. often contain "hold-harmless" clauses. Here, again, the courts have been loathe to require indemnity for the contractee's negligence in the absence of clear, explicit and unequivocal language.[16]

An examination of many clauses of this type, in connection with construction contracts, leads to the belief that, in practically any jurisdiction, the court would be inclined to allow the owner or contractee to obtain indemnity, despite its own negligence, if the following language had been used:

> The Contractor agrees to indemnity and save harmless the Owner and General Contractor against all claims, loss or expense by reason of the liability imposed by law upon the Owner or General Contractor for damages because of bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons, or on account of damage to property, arising out of or in connection with the performance of this contract, whether such injuries to persons or damage to property are due or claimed

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[11] Batson-Cook Co., Inc. v. Industrial Steel Erectors, et al, 257 F.2d 410, 412 (5 Cir. 1958); George Sollitt Construction Co. v. Gateway Erectors, Inc., 260 F.2d 165 (7 Cir. 1958); Frankel v. Johns-Manville Corp., et al, 257 F.2d 508 (3 Cir. 1958); Mohawk Drilling Co. v. McCullough Tool Co., 271 F. 2d 627 (10 Cir. 1959).

[12] Bournougias v. Republic Steel Corp., 177 F.2d 726 (7 Cir. 1960)—"In consequence of the carrying on by the seller of the work." Princemont Construction Corp. v. Baltimore and Ohio Railroad, 131 A.2d 877, Mun. Ct. App. D.C. (1957)—"In connection with or growing out of the use of the premises." Hartford Accident and Indemnity Co. v. Wolden-Allen Co., 238 Wis. 124, 297 N.W. 436 (1941)—"Due to, arising from or connected with your operation on this job." Russel, Etc., v. Shell Oil Co., Inc., 339 Ill. App. 168, 89 N.E.2d 415 (1949)—"Resulting from or arising in connection with any of contractor's operations." St. Paul Mercury Indemnity Co. v. Kopp. Ohio App., 121 N.E.2d 23 (1954)—"Growing out of or in any way connected with the performance of the work."

[13] 3 A.D.2d 507, 162 N.Y.S.2d 145, aff'd 5 N.Y.2d 723, 177 N.Y.S.2d 709 (1958).

[14] 66 N.M. 41, 341 P.2d 460 (1959).

[15] These words were suggested by several decided cases among which were the following: Joseph v. Atlantic Basin Iron Works, Inc., 132 N.Y.S.2d 671 (1954); Indemnity Insurance Company v. Kootz-Wagner Electric Co., 233 F.2d 380 (7 Cir. 1956).

[16] Whitney v. Employers Casualty Co., 158 F.2d 209 (5 Cir. 1946); General Accident Fire & Life Assurance Corp., Ltd. v. Viking Automatic Sprinkler Co., 193 F.2d 524 (9 Cir. 1954); Halliburton v. Paulk, 180 F.2d 79 (5 Cir. 1950); Semanchuck v. Fifth Avenue & 37th Street Corp., 290 N.Y. 412, 49 N.E.2d 507 (1943); See, also, the California rule on the "interpretation" of these contracts as discussed in Harvey Machine Co., Inc., et al v. Hatzel Buehler, Inc., et al, 6 Cal. Rptr. 284 (1960); 54 C 2d 445, Mitchell's Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775 (1957)—". . . agrees to hold the lessor harmless from all claims for any suit damage."

to be due to any negligence or absolute liability, in whole or in part, of the Contractor, its sub-contractors, the Owner, the General Contractor, his or their employees or agents or any other person.[17]

Another form of this type of clause designed to place the entire burden upon the contractor actually performing the work is the following:

> The Contractor shall indemnify the Owner and General Contractor and save them harmless from damage to their property and from all claims and judgments for injury or death to persons or property damages (including costs of litigation and attorneys' fees) made or obtained against the Owner or General Contractor by third persons (including Owner's and General Contractor's employees and agents) based on injuries or damages to person or property, in any manner caused by, incident to, connected with, resulting or arising from the performance of this contract or the operations of Contractor's employees and/or agents on Owner's premises regardless of whether such claims are alleged to be caused in whole or in part by negligence, or otherwise, on the part of the Owner, the General Contractor, the employees of either of them, or anyone else.

The Need for Insurance

Despite the presence of well-worded and complete hold-harmless clauses in this type of contract, it should be appreciated that such assurances are only as good as the financial responsibility of the indemnitor. For this and other reasons, it has become the custom of buyers and owners, in contracting for goods and services, to require not only adequate contractual indemnity but also to stipulate that such promises be backed up by adequate contractual liability insurance coverage. The following is a form of a paragraph often included in a "Contractor's" agreement, in addition to the contractual indemnity provisions:

> The Contractor agrees to carry as a minimum the following insurance in such form and with such carriers as are satisfactory to the Owner covering the Contractor's liability arising out of or in connection with the furnishing of work or material hereunder. A certificate of such insurance (not cancellable without fifteen days' notice to the Owner) shall be furnished by the Contractor to the Owner before work is commenced under this agreement
>
> 1. Workmen's Compensation and Employers Liability insurance in an amount required under the laws of the State in which the work or any portion thereof is performed.
> 2. General Liability insurance in which the limits of liability shall be $100,000 /300,000 for bodily injury and $50,-000 for property damage.
> 3. Contractual Liability insurance covering the obligations of the Contractor to indemnify the Owner as above set forth, with the same monetary limits as the General Liability insurance.

Some Limitations on the Use of Indemnity Clauses

An owner or buyer who seeks to operate under contracts, purchase or work orders, containing full indemnity and insurance requirements, may for various reasons, be unable to find contractors or suppliers willing to accept such terms.

In the first place, since competition is the life of trade, those who attempt to purchase articles or services may find difficulty in obtaining contractors or sellers if such elaborate contractual indemnification provisions are insisted upon, particularly where there are other owners or buyers in the market who are willing to operate without such requirements.

Secondly, the indemnitee may become aware of the part that superior bargaining power plays in this field, and, depending upon his economic stature may find it difficult to carry on his business and obtain effective indemnities at the same time. In determining the efficacy of indemnity clauses, some courts give substantial weight to this element.[18]

Third, the standard grant of contractual liability coverage added by endorsement to a standard general liability policy may not give absolute protection under any and all circumstances. Some underwriters may be unwilling to issue a policy of insurance for as broad a coverage as a particular contrac-

[17] George A. Fuller Co. v. Fishbach & Moore, Inc., 7 A.D.2d 33, 180 N.Y.S.2d 589, leave to appeal den. 6 N.Y.2d 705, 159 N.E.2d 355 (1959); Stellato v. Flagler Park Estates, Inc., 11 Misc.2d 413, 172 N.Y.S.2d 90, Aff'd 6 A.D.2d 843, 176 N.Y.S.2d 742, leave to appeal den. 5 N.Y.2d 706, 153 N.E.2d 798 (1958); Tillman v. New York City Housing Authority, 198 N.Y.S.2d 682 (1960).

[18] See Tyler v. Dowell, Inc., 274 F.2d 890 (10 Cir. 1960) and the cases collected in 178 A.L.R. 8, at pp. 16-20.

tual obligation may require. Also, there are standard exclusions, and even though some of them may be deleted (depending on the risk) for an extra premium, nevertheless, some basic limitations will remain, notably that the damage be caused by accident or occurrence and that penalties and liquidated damages will not be covered.

These observations, it is submitted, emphasize the fact that indemnity agreements, insured or uninsured, will probably not be the complete answer to this perplexing problem.

Shifting Liability in the Sale of Merchandise

Another situation in which the shifting of responsibility has become popular is that involving the purchase of merchandise such as food, drugs, etc., although it exists in connection with manufactured goods of almost any sort. Thus, a retail supermarket may purchase thousands of articles of varied kinds for resale to the public, and, in connection with such purchase, may require the "wholesaler" to provide a "Products Liability Endorsement – Vendors" which is attached to the wholesaler's General Liability Policy that may be issued to him as the manufacturer or supplier of various products. Such an endorsement will provide protection to the supermarket against claims for accidental damages on account of injuries to persons purchasing or using the product, the application of which is best illustrated in the so-called "foreign-substance" cases.

However, this type of insurance, also, contains certain exclusions. For instance, a form of this Endorsement may provide that the insurance does not apply to negligence or unauthorized express warranty of the vendor. It may also provide that the insurance does not apply to any one from whom any part of the product has been acquired. There is available another form of the Vendors Endorsement which provides a broader coverage in that it will protect the purchaser with respect to the possession, consumption, handling or use of or the existence of any condition in the merchandise or product manufactured or distributed by the named insured. In this endorsement, the exclusions are only with respect to any person who changes the form of the product; repacks it, or demonstrates, installs or repairs the product away from his premises.

Reflection upon the foregoing discussion will probably suggest that the efforts that people make to remove from themselves all risk of legal liability are not invariably successful and that they provide a fruitful field for litigation. Perhaps, since the cost of accidents should normally be reflected in the cost of doing business, a more satisfactory procedure would be to eliminate entirely artificial attempts to shift risks, thus letting them fall where they may under common-law liability principles, depending directly upon insurance for the needed protection and leaving the insurers to determine, among themselves, whether in any particular case indemnity or contribution should be obtained.

However, the presence of "hold-harmless" clauses in agreements for goods and services has become deeply rooted in this country's business habits and probably will so continue as long as business people are convinced that costs can be avoided by shifting risks. Whether, in fact, this is so, in an ultimate sense, "deponent sayeth not!"

Conclusions

There is no clear, easy, simple or ready solution to the problems discussed. It is suggested, however, that buyers of merchandise and contractors for work, in entering into agreements for goods or services, will find it to their advantage to consider carefully the following:

1. Whether, under all the circumstances, a contractual shifting of legal liability for loss or damage should be sought.
2. If so, whether this shall be attempted through the conventional indemnity clauses, insured or uninsured, as an incident of the over-all agreement.
3. Whether, assuming both parties to any agreement have procured liability insurance for themselves, the economics of the situation should require that the liability be let fall where it may.
4. If a "hold-harmless" clause is to be included in the contract, many difficulties will be avoided by having the nature and extent of the indemnity expressed in words that leave no doubt in the mind of the reader as to what is intended.
5. That such indemnity is no better than the financial worth of the indemnitor
6. That advice of legal counsel and, with respect to insurance matters, of insurance underwriters, should be sought in making and implementing the decision as to what, if any, contractual indemnity ought to be required in particular circumstances.

A New Approach For The Defense*

PRESTON N. ERICKSEN
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UNDOUBTEDLY you have heard many fine remarks by competent defense lawyers on defense tactics. I'm sure you have benefited from these suggestions, as I have.

Instead of warming over well-established old pointers, I am suggesting a new, fresh approach.

NEW ATTITUDE—ELIMINATE DEFENSIVE THINKING

We should eliminate defensive thinking.

The law and the insurance industry refer to "defendants" and "the defense". We can't help that.

But we can cure ourselves of thinking defensively.

It is my position that defensive thinking and acting immediately puts us at a disadvantage—both in settlement negotiations and in trial.

Our people are real people, real drivers and have real rights and duties. We are on one side of a case and must serve and represent these people. We should be advocates for that side, giving hard, vigorous and positive representation. We should not defend, but sell.

Everyone has heard that "a good offense is often the best defense." There is no reason why this principle should not apply to claims work and trials.

It works!

IS THERE A NEED FOR A NEW APPROACH?

Some very able, imaginative and aggressive plaintiffs' lawyers have provided new ideas and approaches for their side. They have worked for and—in many cases—obtained what they call the "adequate award".

In short, their new approaches have resulted in more plaintiffs' verdicts and higher awards.

Here are some of the things they are doing:

*Summary of an address delivered before the Conference of Mutual Casualty Companies, on May 5, 1961, at the Conrad Hilton Hotel, Chicago, Illinois.

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1. STEREO X-RAYS: This is an x-ray process that gives depth and dimension to x-rays. The fracture looks clearer and more serious. It emphasizes the injury.
2. MEDICAL DRAWINGS: Here we have fine medical drawings showing the injured area in clear detail. The fracture looks more definite than on x-rays. Tissue injury looks more serious. And there is the liberal use of reddish coloring to add drama.
3. SPECIAL EXPERT TESTIMONY: Experts can give opinions on almost anything. A parade of engineers, physicists and other learned men are directed to the stand to give opinions on many things. They can even tell speed, direction of approach and point of impact from photographs only.
4. PERSPECTIVE PHOTOGRAPHS: By changing the lens or other parts of a camera, the picture can be distorted. After all, it is difficult to reproduce the scene as actually viewed by the eye. For example, a small depression in the sidewalk, causing a plaintiff to fall and become injured, can be made to look like the Grand Canyon.
5. INFLAMMATORY PHOTOGRAPHS: Photographs of an injury site, after an operation, can be very effective. Or, in a case of a severed limb, a photograph of the lost part, taken by itself, can be

very inflammatory. Some hospitals have medical photographic departments that can take colored slides which, when projected, can demonstrate an injury or special condition much better than words.

6. OTHER VISUAL AIDS: Some people respond to what they hear; others are more impressed by what they see. Knowing this, plaintiffs' lawyers have used many devices such as scale models of accident scenes, blown-up photographs of key testimony (from the daily record), artists' diagrams, blackboard drawings and even illustrative posters. If not overdone, the effect can be tremendous.

We should be ashamed to concede that almost all of these ideas started with plaintiffs' lawyers.

They know that they can get more money by the use of these aids.

Isn't it time the defense "got off the dime"?

We should spend more of our time working on new ideas and new approaches; that is, if we want defense verdicts and lower awards.

PREPARATION—MORE TIME, MORE MONEY

There is no panacea or fund of ideas that magically will win lawsuits. The adjuster and the lawyer will just have to work harder. Companies should not be afraid to spend money if they want results.

Preparation starts with the company. First—for heaven's sake—look at the scene of the accident! This is a case from our files:

ILLUSTRATION: A defense lawyer was faced with a claim that the insured's unattended vehicle "ran away" and struck the claimant in the back of the legs while he was loading a bread truck. After the accident, the insured's brakes were found to be in bad shape. The trial lawyer made a routine check of the scene and found the street was level. The plaintiff's lawyer forgot or neglected to look at the scene (all the time assuming there was a grade). The defense produced an expert and a drawing showing a one percent grade—insufficient to cause the defendant's car to start by itself. Also, it was demonstrated to the jury that the plaintiff would have gone backward if he were struck behind the knees from the rear, instead of going forward as he had testified. A look at the scene, plus a fresh, tailored approach, resulted in a defense verdict. (The jury apparently believed the defense contention that the vehicle ahead backed up and caused the accident.)

The claims adjuster should assume that every case might go to trial. He should, in all serious cases, determine if sub-rosa investigation should be undertaken.

Don't be afraid to show movies if they are good. I have heard defense lawyers say they are afraid to show movies because jurors might get angry with them for "prying". I say there is too much "pussy-footing" and not enough meeting the issues head-on. If they show the plaintiff unquestionably is falsifying or malingering, movies will help.

ILLUSTRATION: A 13-year-old boy, while riding a bicycle in a crosswalk, was struck by a right-turning motorist who did not see the boy before impact. The boy sustained a serious Colles fracture of the right wrist. As it turned out, the boy actually had a good recovery with very little disability and loss of motion. Yet the contention was that he could not engage in sports and would have a permanent injury. Sub-rosa movies had been taken, clearly showing the boy strenuously playing baseball, basketball and other sports. The decision had to be made as to whether the movies should be shown (since the boy was extremely well-coached and made an excellent appearance in his new suit and "Little Lord Fauntleroy" shirt). It was decided to meet the situation head-on and show that the boy was actually a little "faker". The movies were shown and were well received, since they actually demonstrated that the boy was not telling the truth and everyone on the plaintiff's side had exaggerated his injuries. A defense verdict resulted.

Preparation should extend to neighborhood checks, checking for prior accidents and anything to indicate any strange propensities of the plaintiff.

ILLUSTRATION: The plaintiff was a victim of a rear-end collision. She appeared to have a good medical case, but there was little to justify her extended subjective complaints. Since there was little hope on liability, special attention was focused on a neighborhood check. It was found out that she "heard little men on the

roof", "people were trying to poison her water" and other strange "goings on". The defense called a psychiatrist who testified that the plaintiff was paranoic and that her symptoms could very well be due to her paranoid tendencies and not to any accident. The result was a very low award.

Every effort should be made to capitalize on the human tendency to exaggerate injuries or to cover up past accidents or injuries. Here, one must not overlook medical records. Where a past claim has been made, the Index Bureau will usually show the accident. But watch out for the denied prior occurrence that the plaintiff thinks there is no record of.

EXAMPLE: A plaintiff slips on a foot scraper on a porch. The initial injury is minimal. Later, a "plaintiff's doctor" gets the patient. Three operations are performed; one on the left elbow. Although there was no initial injury to the elbow, this "doctor" testified it had been fractured in the accident. Later defense x-rays showed merely an old healed fracture. The Index Bureau was checked with negative results. All possible medical records were subpoenaed. At trial, every time a doctor's name was mentioned, past or present, his records were subpoenaed by the defense. The day before argument, medical records were brought in showing an old serious fracture (denied on the stand). This resulted in a defense verdict.

It cannot be emphasized too strongly that investigation and preparation must begin with the company. A well-prepared file will often make a "hero" out of the lawyer.

In investigation, the defense has an advantage. It can often get to the scene first and interview witnesses first. This advantage should be used.

ENTHUSIASM

It has been said that nothing was ever done well without enthusiasm.

Probably the worst thing about defense people (claims men and lawyers alike) is the lack of enthusiasm.

The claims manager should instill enthusiasm in his adjusters. Adjusters should solicit enthusiasm from the insured. Any investigator in contacting witnesses for the defense should eminate confidence in the case. It is amazing how this will affect the attitude of witnesses and how preparation will "zip" along.

When the adjuster makes his first contact with the attorney to investigate settlement possibilities, he should take advantage of the situation. He can impliedly compare his "thick" file with the lawyer's inevitably "scanty" file. Here is an opportunity to display for the first time a positive and confident attitude to the adversary. The effect may be greater than anticipated.

When the defense lawyer goes to trial, how about you claims men coming down to "root him on". Show a little team spirit. At least contact him during trial to "find out how we're doing."

So, generate enthusiasm!

BE AGGRESSIVE

Why is it that, for the most part, defense people—and particularly defense lawyers—are not aggressive?

Jurors are not much different from fight fans. While they may admire someone with skillful footwork, they like a "fighter".

It is true that some cases may require a more delicate approach than others. Also, lawyers have different styles. But I doubt if a lawyer loses much ground in any case if he approaches it vigorously and with the attitude that "we are right".

For example, most good plaintiffs' lawyers give a very complete, well-thought-out opening statement. Here, at the start of a case, is a chance to get a good, solid punch in. What does the defense lawyer usually do? Often he gets up and says apologetically something like this: "We reserve the right to give an opening statement until the commencement of our case." And, when defense counsel says this, he often does not even completely stand up; he mutters these words in a kind of half-standing, half-sitting position. What a way to start a lawsuit!

I don't think a lawyer should pussy-foot around. If he has good evidence and can show the plaintiff is a malingerer, I think it is valuable to say so in a short, to-the-point opening statement, provided his entire case is not based on surprise.

Also, a lawyer should not be afraid to criticize a doctor head-on. In a recent case, the other lawyer said, "Counsel is trying the doctor." I replied, "Of course I am. I

am putting the doctor's obvious bias and opinions directly in issue."

Again, style is personal, but a retiring, apologetic defense counsel may feel more so when the verdict is in!

Fresh Ideas—Tailored To Case

It would be nice if I could give you a list of neat, fresh ideas in a package that would solve all your claims problems. Obviously, I can't.

I have some suggestions to offer, but before I present them, I want to emphasize that new ideas come from an approach—not from a list of things to do.

I urge you to keep an open mind. Think of every approach to a given case—no matter how far-fetched. Then weed out the unsuitable theories or approaches.

One idea that has gone over is to use a chart in argument. When the defense lawyer sits down, his chart continues to argue for him; that is, until the clerk or the bailiff takes it down. On this "chart", I suggest that a few key ideas and words be printed in bright, easy-to-read paint or ink. The chart can even be placed over any figures or remarks plaintiff's counsel has placed on a blackboard.

Another useful idea is for the adjuster to take the picture of the plaintiff's car damage —always where it is minor. This picture may then be enlarged to 12 x 14, or even larger. This should be placed in evidence as soon as possible and displayed at every turn. Regardless of the claimed injuries, this should offer mitigation.

As indicated, neighborhood checks should be undertaken in serious cases. Who knows what it will reveal? Here are some examples:

1. The plaintiff is paranoic.
2. Illicit activities are going on.
3. Prior accidents are revealed.
4. Strange propensities of the plaintiff are brought to light.
5. Movies of physical activities can sometimes be obtained.

Lawyers and adjusters should challenge doctor bills. We should not "stipulate" to specials. An effort is underway now to solicit help from the various medical associations to expose the "builders" and "dynamiters".

"Typifying" cases should be discouraged. All rear-enders are not cases of liability.

ILLUSTRATION: The defendant's vehicle struck the plaintiff's car after the latter stopped for a red light. The defendant testified as to a sudden stop and to no hand signal. Both plaintiff and his passenger stated they went forward after the accident. The plaintiff's testimony indicated he was in doubt as to whether he was knocked across the intersection or whether the car "creeped" across due to the automatic transmission. Damage to the car was light. It also appeared that the light changed to red just before the accident. Liability was argued strenuously on two theories: (1) The plaintiff led the defendant into a trap when the former first tried to make the light, then stopped at the last minute, too late for the defendant to avoid the accident; and (2) the plaintiff's injuries occurred, not when he was struck from the rear, but when he stopped suddenly and went forward into the steering wheel. The result was a defense verdict.

In short, fresh ideas must come with each case—tailored to fit that case.

Medical Preparation—Before And During Trial

Much has been written and more said about this subject—with little meaning and less help for us.

There are texts, encyclopedias and articles. There are pictures, charts and lengthy discussions. The wealth of material is increasing, but the depth of understanding is not.

Why—from our standpoint—is this so?

Some say there has never been a clear and accurate appreciation of an objective. Others state that the approach has usually been too general. But—more significantly —I think books are just not the answer; and, to make matters worse, too many adjusters and lawyers, after having read a few books, think they are smarter than doctors.

Our job is not to acquire general medical knowledge nor to "become smarter than doctors". It is really quite simple. We should try to determine what actual, honest-to-goodness injuries have been sustained in each case. We should look for—and find—all distorting factors, whether they originate in the history of the claimant or are supplied by the complex forces of our society.

Even though we may know our objective, it takes a good deal of industry and soul

searching to realize and, indeed, admit that we have pitifully few tools to work with, and that we are haphazard and sometimes inept in using the tools we do have.

Contrast this situation with the new breed of plaintiffs' lawyers who are working for—and obtaining—what they call the "adequate award". They are doing it by skill, preparation and dedication.

Let's get down to business. Let's get the talking over with. Let's roll up our sleeves and get to work. And don't forget—our work begins before trial and may continue during a trial. How do we know the case will settle?

The following are some suggestions that might prove helpful.

Obtain Adequate Medical Information

When we indulge in this self-criticism, we should not—on the other hand—detract from the downright excellent jobs some of our claims men and lawyers are doing. Many of the suggestions I make will be "old hat" to some "old pro's" in the insurance business.

They would tell you—as I shall—that adequate medical information should be obtained. This important subject is often lost sight of in the quest for lost witnesses and liability information.

Don't forget the way an accident happens is important to show what injuries may have been sustained. The claimant's version of the accident, too, may be contrary to the laws of physics or may be mechanically unbelievable. For example, in the usual rear-end accident, we have learned to beware of the claimant who says he was thrust forward instead of backward.

The simple question of the severity of impact—or its lack—may, indeed, be significant.

It is just good procedure to check and see if complaints were voiced by the claimant at the scene to the other participants or to the police. Distortion is certainly expected if injuries do not show up until after a lawyer is retained or a claim filed.

Another fertile source of information is to find out if the claimant made a prompt report of the injury to his employer. Too often we see a case where the claimant may go back to work for a few days, doing heavy work, only to quit later to show some "loss of work" to support his claim for damages.

In investigation, the adjuster should be alert to spot efforts by "others" to push people into filing claims. This often can be uncovered by a prompt neighborhood or work check.

Not all companies belong to the "index", or use the "index system". We all know how valuable, however, this tool is in pinpointing "priors".

When the adjuster's job is done and the case goes to the defense lawyer, the selected counsel should use his discovery tools in obtaining the medical records of all treatment since the accident. It is a known fact that many people are suffering from medical conditions or diseases which can produce symptoms similar to aches and pains claimed from accident injuries. The records should be obtained to rule this in or out, and to limit the area of claimed injuries. All medical records before the accident should be obtained in addition to those concerning the accident itself. Of course, it may be desirable to wait until trial in certain cases to subpoena some of the records in order to retain the surprise element.

Especially important is the work done during trial. Often a new medical fact is learned during trial, or an offhand remark is made about a hitherto unknown doctor or record. It is relatively simple to call the office at recess and have the records subpoenaed.

Here I would like to mention how valuable it is to have the adjuster present at the trial. He can keep investigation going during trial and is immediately available to "hunt down a lead" or "dig up a needed fact".

As we will see later, adequate medical information is indispensable in order to get a clear evaluation from defense medical experts and to eliminate distortion.

Naturally, the amount of investigation or medical research will be governed by the size of the case and the discretion of the adjuster or lawyer handling it.

Distortion Factors

You may be wondering what are the "distortion factors" to which I have been referring. Some of the more obvious ones are as follows:

1. MALINGERING: The malingerer has been defined as a person who deliberately and consciously simulates illness.

He knows that he is not ill, but he pretends to be. He suffers no pain except that which he may inflict on himself in order to simulate the symptoms of the illness he pretends to have. The malingerer, therefore, consciously, knowingly, and deliberately acts so as to fool others in order to gain his advantage. A true case of malingering warrants no compensation; and, regardless of liability, he usually gets none when his condition is exposed.

2. HYSTERIA: Hysteria is one type of neurotic illness. It has been described as an unconscious psychological reaction to stress. The hysteric individual really believes he is ill. The victim of hysteria unconsciously, unknowingly, and without deliberation acts as he does to serve some inner need. Hysteric symptoms, although not resulting from an organic cause, are real to the victim. The real problem is often that a person who is malingering is also hysteric, or otherwise neurotically ill.
3. PARANOIA: This is another form of mental illness that can cause distortion. A person with paranoia often is discribed as having delusions. He imagines things that are not so. Besides thinking people "are after him", certain paranoics can imagine they have injuries or symptoms when no physical cause is shown.
4. LITIGATION NEUROSIS and COMPENSATION ANXIETY: These are terms which many doctors do not accept as being accurate terms to describe neurotic ills. They are generally used to describe cases where symptoms disappear after the case is settled with "greenback therapy".
5. MORAL DECAY: This is perhaps the culprit in more cases than not. Our society has tacitly approved a certain amount of exaggeration in accident cases. Some people believe that "fudging" in an accident case is like cheating the government out of income taxes. In either case it is morally wrong. I was surprised and shocked to see this type of thing actually tacitly approved in a leading legal text, which stated:

> Most people exaggerate their symptoms. Their motives are varied. Some do so for emotion gratification, others for material gain, and still others for motives of which they are not conscious. Carried on to a reasonable degree, such exaggeration is not malingering. . . .

The unfortunate part is that it is very difficult to find and harder still to expose these distortion factors—especially where the claimant is clever and has had some initial physical injury. The most popular method is by sub-rosa investigation and/or movies; however, this is a hit-or-miss process.

Some trained medical examiners—given proper medical information—can often spot these factors and prove them.

New Testing Methods Needed

In some states, the defense is entitled to only one medical examination as a matter of right. True, a subsequent examination can be had by stipulation in many cases, but this cannot be assumed.

We, therefore, should become painfully aware of the importance of this examination. It may be that a complete reevaluation of the testing process is indicated.

The choice of the examining doctor is the first order of business. Unfortunately, the examiner is not always selected with enough care. Cost of the examination and report and habit dictate the selection far too often. Further, the discretion and knowledge of the adjuster or lawyer are sometimes not equal to the task of determining the time the examination should be made—whether early or late. Also, the kind of specialist needed (orthopedist, internist, neurologist, or physiologist) does not come in for enough attention. We feel the answer to this problem is to solicit cooperation from organized insurance groups in each area for funds and personnel to conduct supervised interviews with a broad base of examining physicians with a view to arranging fee schedules, setting up report forms, lining up testing methods, confirming willingness to review medical records, and setting aside time for research.

Recently, I picked several medical reports out of my files at random. There was a good deal of variation in testing procedure. We all know there are some tests that will determine malingering. One example is the double test for limitation of motion: The first test (straight leg raising) is given when the patient knows what the test is for and the movement is made by the patient him-

self. In the second test, the doctor moves the limb himself in such a way that the patient does not know what is happening. A glaring difference in reaction can indicate malingering. The doctor can also give tests such as "grip tests" to determine if the patient is putting forth his best effort; i.e., whether or not the knuckles become white when gripping pressure is exerted.

We have all heard of other tests that have been helpful.

There should be more cooperation and exchange of information on testing methods, with a view to determining as accurately as possible the exact injuries sustained.

Also, as we have seen, it can be important to test for neurotic ills as well as physical ills.

Psychological Testing

Actually, for legal use, mental and psychological tests have been developed more highly than physical tests.

These tests have been used in the courtroom, although, in most instances, in connection with criminal cases.

Nevertheless, these tests can be specific for hysteria, paranoia or other neurotic ills. Also, falsehood and malingering can not only be detected but graded.

Two tests which might be suited for personal injury work are the Minnesota Multiphasic Personality Inventory and the Rorschach Inkblot Test. The following is an applicable case history:

ILLUSTRATION: The patient, an attractive, young mother of four had tumbled down the entire length of a department store escalator. Wearing a tight skirt, she had been struggling with a large number of bundles. She had suffered cuts of the face and legs requiring a total of twenty-three stitches, although all had healed well without serious disfiguration.

Shortly before leaving the hospital, she began to complain of painful headaches. After four days at home, she returned to the hospital for further study. Previous neurological examinations had been negative and were also negative after her return to the hospital.

She was then given certain psychological tests. Clear hysterical patterns were found. Informed of the negative organic findings, the patient's demanding, irregularly—employed husband dropped their suit against the department store and made a settlement for the external physical injuries. The headaches disappeared within two weeks of the settlement.

This type of testing is in its pioneer days. I urge you all to use this helpful tool and exchange information.

Even when a test has not been given, a properly qualified psychologist often can spot a neurotic illness from a review of the records.

Proper Use Of Medical Experts

Don't use a book, use a doctor.

I don't mean that books do not aid us. My point is simply that we should make proper use of medical experts.

In the appropriate case—where there is a risk of a substantial verdict—it is helpful and prudent to have a qualified medical expert examine available records. He can then "coach" the lawyer on the theory of the case and how best to find distortion, malingering and neurotic ills. Further, he can help defeat unwarranted claims that a given trauma has brought on or precipitated disease. He can advise how to get help from other specialists—and often can interest another doctor to the point where the additional witness can be somewhat "pre-selected."

Remember, it is still proper to use a hypothetical question. Testimony can be elicited properly from a doctor without an examination (although obviously it may be better to have an examination). The medical records can many times provide all the necessary facts for the expert's opinion.

ILLUSTRATION: The plaintiff, a 40-year-old woman, was a victim of a hit-run accident. Impact was severe. The claimant's initial complaints were severe. She was numb from the waist down. She had sprains of the neck, back and shoulder, together with a steering wheel injury to the chest. Her physical objective complaints cleared up in about two months. She then was observed to complain of a "stocking hyposthesia". About two months before trial, after having had no medical care for a long period, she had an onset of continuous, generalized pain with no objective findings. (She even complained that the bedsheets caused her pain.) A substantial settlement was demanded, and the case went to trial. A medical consultant reviewed the records for the defense and suggested that certain complaints were hysterical in nature.

A qualified psychologist was consulted to review the records and testified that the "stocking hyposthesia" was a feeling that the outer layer of skin—like a stocking—was numb or "dead-feeling". He explained that this was a classic sign of hysteria, since there is no nerve distribution that can cause this complaint. Also, the later recurrence of symptoms were related to anxiety over the impending trial. The defense admitted liability and told the jury they would pay for the genuine physical injuries. Result: A very low award.

Obviously, cost would prohibit this procedure in every case. In serious cases, however, we should use doctors' medical brains and not lawyers' medical brains.

Remember, the average amount of plaintiffs' verdicts is still rising. Unless we do something on the defense, we may run into ruinous legislation for insurance companies or pave the way for unknown consequences. We should prepare as our brilliant leading plaintiffs' lawyers prepare. Perhaps our renewed efforts will be rewarded with a lower premium dollar and more reasonable verdicts. At the very least, we will be better prepared to find the truth and expose distortion.

Prove Plaintiff Undeserving

Almost everyone has a skelton in his closet.

Often the legitimately injured plaintiff will exaggerate injury or cover up an old complaint or injury.

It is legally admissible to show that a plaintiff has been convicted of a felony. Or, sometimes, it may be admissible (when the medical problem has been approached correctly) to show prior venereal disease. Certainly prior denied injuries or complaints can be shown.

This is all leading up to the fact that the defense lawyer should look for facts that will prove the plaintiff undeserving.

When the plaintiff is shown in a bad light, it will often lower the award or tip the scale toward a defense verdict.

The Lawyer Is Not A Judge

Some might ask: "What is the moral and legal justification for this approach?" The answer is simple: The lawyer is not a judge. He is not the one to decide on what is fair. He is an advocate. He must espouse his side. While he must look for the truth, he must also do everything to expose falsehoods. It is a lawyer's job to show bias, motive and impeachment; if none of these things exist, the plaintiff has nothing to worry about. Remember, the plaintiff filed the lawsuit and is asking for money. Red carpet treatment should not be expected.

Also, remember that the plaintiff's counsel has spent time with his plaintiff—all directed to the end of making a good impression on the jury. After all, the jury can choose. Counsel merely points the way.

There should be no criticism of either side if all that might have been done was done. Either side is justified in using all legal and honest methods at their disposal. No complaints should be made just because the fight was tough.

There are many deserving, honest plaintiffs with worthy claims. These claims should be settled. Unfortunately, today the country is becoming extremely claims-conscious. And those of us in the business may be justified in adopting a "show me" attitude.

In conclusion, I would like to relate an incident that happened after one of my first jury cases. After the case was over, I asked some of the jurors for suggestions as to how the lawyers could improve. The answer was, "Keep it short!"

So, to keep it short, I will close.

Arbitration Under The Uninsured Motorists Coverage*

LEROY W. FIETING
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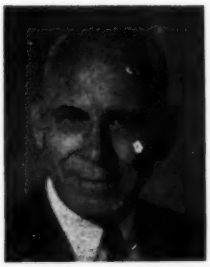
PROVISION for arbitrating what were anticipated to likely be the most common kinds of disagreements between insurance companies and their insureds under uninsured motorists coverage has been part and parcel of this form of insurance ever since its inception in New York State back in 1955. It recognizes the desirability of and is designed to accomplish these things:

1. Provide a speedy, just and economical means for determining the amount of the insurer's payment liability.
2. Avoid the necessity for and disadvantages of litigation with the uninsured motorists prior to settlement of claims under this coverage.
3. Leave the legal status of the uninsured motorist's liability to respond in damages unaffected by any action or proceedings taken in disposition of an insured's claim under this coverage.

ARBITRATION REQUIREMENT

The basic arbitration requirement, as I am sure all of you know, is part of the very grant of coverage, the insuring agreement specifying that "determination as to whether the insured * * * is legally entitled to recover * * * damages, and if so, the amount thereof, shall be made by agreement between the insured * * * and the company or, if they fail to agree, by arbitration". Means for implementation of this arbitration requirement and objective are contained in two additional policy (or endorsement) provisions. One of these specifies the American Arbitration Association as the tribunal for any arbitration, gives both insured and insurer equal right to institute arbitration, and makes the arbitrators' awards binding on the parties even to the extent of permitting entry of judgment on such awards. The other makes full compliance with all terms of the uninsured motorists coverage a condition precedent to any action against the company.



LEROY W. FIETING *has occupied practically every position from investigator to claims manager in field and home office claims departments during his more than forty years in insurance claims work. He is presently Home Office Claims Manager for the Hardware Mutuals — Sentry Life Companies.*

INITIATING ARBITRATION

Initiation of an arbitration under the compulsory arbitration provisions of the policy is a simple procedure. All that it is necessary to do is to send a written notice or Demand for Arbitration to the other party, and then file two copies of the notice with the American Arbitration Association along with a check payable to the Association to cover the applicable administrative fee. The notice or Demand must specify the matter in dispute, the amount claimed, if any, and the remedy sought. I shall not take the time to mention subsequent procedures relating to arbitration as they are fully described in the American Arbitration Association's pamphlet on "Accident Claims Tribunal Rules". Copies of this pamphlet are obtainable from the American Arbitration Association on request and certainly no company should attempt to either initiate or defend an arbitration without a copy of these Rules for reference use.

ARBITRABILITY OF CLAIMS

The subject of arbitration or arbitrability of claims under this coverage can be roughly subdivided into two broad parts: (1) the

*This paper was delivered at the annual claims conference of the National Association of Mutual Casualty Companies and National Association of Automotive Mutual Insurance Companies in Washington, D.C., on April 17, 1961.

scope of application of the arbitration requirement, and (2) its enforceability.

Let us examine first the scope and intended scope of the arbitration provision.

The language relating to arbitration used in both the insuring agreement itself and in the standard provision arbitration condition seems on its face, too plain and unambiguous to be subject to any construction. Reference has already been made to the language used in the arbitration clause of the basic insuring agreement. The arbitration condition provides:

> If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this part, then upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association * *.

The language employed can leave no doubt but that as to liability (as distinguished from coverage) and as to the amount of recoverable damages, the policy or endorsement makes arbitration of an uninsured motorist's claim compulsory at the option of either the insured or the insurance company. The policy language in this respect, in effect, undertakes to abrogate the right of either party to sue the other in courts of law on such disputed questions.

What about questions as to whether the coverage applies at all to an asserted claim? What about a claim denied by the insurance company on the ground that the automobile which struck the insured was not in fact an "uninsured automobile"? Or, what if the insurance company denies that the injured person qualifies as an "insured" and consequently, is not a beneficiary of this coverage? Can arbitration of such coverage questions be required? Can an "insured" or alleged insured compel the insurance company to proceed with arbitration of disputed questions of liability and damages while such coverage questions remain unresolved?

There manifestly is no reference in any of the policy or endorsement provisions to arbitration of such coverage questions and disagreements.

New York View

It consequently was quite properly assumed and continues to be the position of the insurance companies that coverage questions, as distinguished from liability and damage issues, are not subject to compulsory arbitration and, unless both parties agree to arbitrate such differences, they must be determined in appropriate court proceedings. The New York case law originally developed accordingly and early tended to establish these propositions:[1]

1. Only disagreements between insured and insurance company relating to the legal liability of the uninsured motorist and the amount of the insured's damages must be arbitrated.
2. Other disagreements—those relating to application of the coverage—may be litigated in courts of law or equity.
3. Any attempt to compel the insurance company to arbitrate before application of its coverage has been established is premature and will be stayed or enjoined.
4. The burden of establishing the application of the coverage rests on the person claiming the benefits of the coverage.

Then this trend of the case law in New York suddenly became muddied when the Appellate Division of the Supreme Court (First Dept.) affirmed a contrary decision by a trial court and denied a motion for leave to appeal. In this case the trial court, in denying the insurance company's application to stay arbitration, held that the arbitration clause encompasses a dispute as to whether the owner or operator of the automobile was insured, as well as whether the claimant is entitled to recover damages from its owner.[2] The Appellate Division of the Supreme Court (First Dept.) has by *per curiam* opinions since affirmed two additional decisions to like effect by trial courts within its jurisdiction.[3] So far only one New York trial court not in the First

[1]Berman v. Travelers Indemnity Co., 171 N.Y.S. 2d 869; Ross v. Hardware Mutual Cas. Co., 173 N. Y.S.2d 941; American Nat'l Fire Ins. Co. v. McCormack, 182 N.Y.S.2d 899; Lowe v. Ocean Accident and Guarantee Corp., 193 N.Y.S.2d 361; Phoenix Assurance Co. v. Digamus, 194 N.Y.S.2d 770.

[2]Matter of Bankers and Shippers Ins. Co., 196 N. Y.S.2d 604, 197 N.Y.S.2d 428.

[3]Royal Indemnity Co. v. McMahon, 200 N.Y.S.2d 950; Motor Vehicle Accident Indemnification Corp. v. Kirby, 208 N.Y.S.2d 1010.

Dept. has decided to adopt the views of the First Dept., at least until its own Appellate Division passes on the question.[4] Another trial court directed a jury trial of the preliminary issue of whether the petitioner's decedent was struck by an uninsured automobile, and, if found in the affirmative, to proceed with arbitration. The Appellate Division of the Supreme Court, Fourth Dept., held this procedure unauthorized and reversed the trial court.[5] Although not specifically stated, the opinion implies accord with the earlier cases that an insured must establish the fact that the injury-producing automobile was uninsured before any right to require arbitration arises, and cannot do this by motion against his insurer.

All of the case law on questions relating to applicability of uninsured motorists coverage under the facts and circumstances of specific claims so far has come from the New York courts, probably because uninsured motorists coverage has been written in that state for a longer period of time than in any other state and because of the large volume of this coverage written in that state under the Motor Vehicle Accident Indemnification Corporation Act. It might be pointed out that the arbitration condition in the present New York endorsement is identical to the standard provisions arbitration condition so that the case law on arbitration questions under the compulsory endorsement in that state can be given the same weight as case law construing the standard provisions endorsement or policy.

In the face of the plain policy or endorsement language, the position of the Appellate Division of the Supreme Court in the First Dept. seems untenable and certainly extremely difficult to understand. The *per curiam* decisions it has seen fit so far to publish afford no enlightenment on the basis of the reasoning and conclusions of this court. The most that can be said is that the state of the law with respect to arbitration of coverage issues under the uninsured motorists coverage is at present in a considerable state of confusion in New York. It is respectfully suggested that the position of the insurers should clearly continue to be that coverage issues are not subject to arbitration, and that any attempt to arbitrate before a coverage issue has been determined is premature.

[4]Travelers Ind. Co. v. Sherwood, 205 N.Y.S.2d 741.

[5]Rosenbaum v. American Surety Co., 209 N.Y.S.2d 994.

Enforceability Of Arbitration

Now let us take a brief look at what probably is a more real and serious problem confronting insurance companies—the enforceability of the policy requirement that disagreements on liability and damages be arbitrated.

We must undertake consideration of this problem with a recognition of the fact that the arbitration provisions relating to uninsured motorists coverage constitute an agreement to arbitrate future disputes, and that such agreements are abhorrent to the common law as attempts to deprive courts of law or equity of jurisdiction, particularly when they encompass issues of legal liability. The result is that courts adhering to the common law rule in this respect cannot be expected to provide assistance in enforcing the arbitration agreement, and the courts in some such jurisdictions have already refused to do so. Two states which make the inclusion of uninsured motorist coverage mandatory in all automobile liability insurance policies, South Carolina and Virginia, have statutory prohibitions against the inclusion of provisions for arbitration of any aspects of claims under this coverage. In addition, in Illinois the option to arbitrate is reserved only to the insured by Insurance Department directive based on the case law of that state.

There is, of course, no problem in the 19 states which have enacted statutes authorizing contractual agreements to arbitrate future disputes.[6] The supreme courts of two additional states, Colorado[7] and Nevada,[8] have judicially decreed that agreements to arbitrate future disputes are valid and enforceable. There may be like decisions in some other jurisdictions of which I am not aware. There also is some case authority in Texas suggesting that settlement of disputes by arbitration is encouraged in that state by both a constitutional and some statutory provisions, although the precise question of the enforceability of agreements to arbitrate future disputes, as distinguished from existing disputes, does not

[6]These states are: Arizona, California, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin and Wyoming.

[7]Ezell v. Rocky Mt. Bean and Elevator Co., 232 Pac. 680.

[8]United Assn. of Journeymen and Apprentices v. Stine, 351 Pac. 965.

seem to so far have been squarely decided by the courts of that state.[9]

The reported case law leaves much to be desired with respect to the legal status of agreements to arbitrate future disputes in those jurisdictions still adhering to the common law principle. Although agreements of this kind have loosely been termed void in a number of states, the more general rule seems to be that, under the common law, such agreements are merely voidable at the election of any party and the courts will not give aid in enforcing them or contractual provisions which make arbitration a condition precedent to litigation of the issues. These courts take the position that under the common law they cannot aid in enforcing executory contracts to arbitrate, but will give support and effect to executed arbitration contracts. The general rule in this respect has been well expressed by the North Carolina Supreme Court which said: "At any time before an award is rendered, either party may elect to breach his contract to arbitrate. After the agreement to arbitrate has been consummated by an award, there can be no revocation."[10] To my knowledge, the courts of only two states, Maine[11] and Nebraska,[12] have specifically held awards of arbitrators on executed arbitration contracts invalid and unenforceable.

Where Common Law Applies

How can the parties resolve their differences as to liability or damages in states that adhere to the common law rule? What can happen in such jurisdictions?

The answer to these questions is perhaps best provided by what has already happened in at least two states, Oklahoma[13] and South Carolina.[14] In the Oklahoma case, the insured and the insurance company were unable to agree on settlement of the insured's claim under the uninsured motorists coverage and the insurance company made a demand for arbitration which was rejected by the insured and her attorney. In the South Carolina case, the insurance company, following investigation, decided that the fault for the accident rested with its insured and paid the claim of the uninsured motorist. Thereafter, when the insured made a claim under the uninsured motorist coverage, the insurance company declined to make any payment on the ground that it was not legally liable for his damages.

The remaining facts in both cases are essentially the same. In each case the insureds proceeded with suits against the uninsured motorist, carefully complying with the policy requirement of giving notice of such suits to the insurer and supplying the insurer with copies of the pleadings. In both cases the insurers notified the insured that they were not consenting to these suits and that if they were reduced to judgment against the uninsured motorists there would be a violation of the policy terms relieving the insurers of any payment obligation. Both suits were prosecuted to judgment against the uninsured motorists. In the South Carolina case the judgment against the uninsured motorist was by default. The opinion in the Oklahoma case does not clearly indicate whether the uninsured motorist defended himself.

Having obtained the judgments against the uninsured motorists, the insureds then sued the insurance companies under the uninsured motorists coverage of their policies. In both cases the courts granted judgments against the insurance companies. Both essentially held that inasmuch as the arbitration conditions of the policies were unenforceable, the companies could not rely on the exclusion relating to suits by the insured against a tort feasor without the company's consent, nor the condition making compliance with the policy terms a condition precedent to suit against the company, on the theory that giving effect to either of these policy provisions would leave the insured without any remedy to compel performance of its insurance contract by the companies. The courts in both cases also held that the judgments against the uninsured motorists were determinative both of the legal liability of the insured motorists and the amounts recoverable by the insureds.

The somewhat precarious position of the insurance companies in these jurisdictions is particularly well illustrated by the result in the South Carolina case in which the insurer not only paid the damages sustained by the uninsured motorist, but also was ultimately required to pay its insured his damages without any apparent means of defending itself against the default judgment obtained by the insured.

[9] Ferguson v. Ferguson, 110 S.W.2d 1016.
[10] Skinner v. Gaither Corp., 67 S.E.2d 267.
[11] Contract v. Arsenault, 111 Atl. 578.
[12] Rentschler v. Mo. Pac. Railroad Co., 253 N. W. 694.
[13] Boughton v. Farmers Ins. Exchange, 354 P.2d 1085.
[14] Childs v. Allstate Ins. Co., 117 S.E.2d 867.

The provision requiring notice to the insurance company of any suit against a tort feasor is admittedly designed to give the insurance company an opportunity to protect itself. How can it do this? There is nothing in the decided cases that even attempts to suggest that the insurance company is not privileged to participate in the action against the uninsured motorist. But will participation with the insured provide adequate protection to the insurer, at least on questions of liability, when the uninsured motorist defaults? In the absence of an enabling statute, can the insurer legally undertake to defend the uninsured motorist at its expense? So far only the legislature of Virginia has recognized the problem confronting the insurance companies by enactment of legislation expressly requiring service on the insurance company of copies of process in a suit by an insured against an allegedly uninsured motorist, and authorizing the insurance company to put in a defense for the uninsured motorist even without his consent.

Volume Of Arbitration

The overall consequences so far actually have not been as serious as they may sound. This is perhaps best attested by the fact that the Accident Claims Tribunal of the American Arbitration Association arbitrated 646 claims under this coverage last year, a very substantial number of them in states that adhere to the principles of the common law with respect to agreements to arbitrate future disputes. The American Arbitration Association reports that the demands for arbitration in almost all of the cases—well over 90% of them—were made by insureds claiming the benefits of uninsured motorists coverage rather than by the insurance companies. As already pointed out, most courts will enforce an executed arbitration contract even under the common law rule in the absence of a formal submission, such a submission being implied by the demand of one party and participation in the arbitration voluntarily by the other.

Some Prognosis And Suggestions

The pattern of "things to come" has started to take shape. We would be rather naive to assume that the number of successful objections to arbitration of disagreements will not increase. We can be sure that as more attorneys representing insureds with claims of no merit or very questionable merit become better educated, little opportunity will be lost in trying to put the insurance companies at a disadvantage by suing the uninsured motorists and hoping to obtain judgments by default. What can be done about this prospect?

The course is still relatively uncharted and I don't pretend to know all of the answers. I am sure that no one plan of action will prove equally effective in all of the common law rule jurisdictions. I do have a few possibilities to suggest, and am sure all of us will welcome any additional thoughts any of you may have.

1. Enactment of legislation authorizing and giving vitality to contractual agreements to arbitrate future disputes. Model legislation of this kind has been recommended by the National Conference of the Commissioners on Uniform State Laws, approved by the House of Delegates of the American Bar Association, and has the support of the American Mutual Insurance Alliance. That such legislative proposals may have a "rocky road" is well reflected by the bills offered in four states so far this year expressly proposing to prohibit any arbitration requirement under uninsured motorist's coverage. Three of these bills have died with the adjournments of the legislatures; the other is still pending.
2. Obtaining execution of written agreement by the insured immediately upon development of any disagreement in the course of settlement negotiations for submission of the disagreement to arbitration. Such agreements are enforceable in many jurisdictions under the general rule relating to contractual agreements for arbitration of existing disputes. It is suggested that the possibilities of this means of forestalling litigation of liability and damage questions be not overlooked in any common law state.
3. The possibilities of declaratory judgment proceedings likewise should not be overlooked. I am not unmindful of the fact that actions to determine an insurance company's payment obligations predicated on the legal liability of an uninsured motorist and the measure of an insured's recoverable damages may not be maintainable under all declaratory judgment statutes. It would seem that such actions probably could be maintained in those jurisdic-

tions which have held that the availability of other remedies does not prevent utilization of declaratory judgment procedure for determining rights and liabilities under an insurance contract.

4. Legislation of the Virginia type, giving insurance companies the right to defend actions against uninsured motorists on their merits, would certainly seem better than nothing if legislation giving legal effect to agreements for arbitration of future disputes is not obtainable.

Conclusion

In conclusion, I can only suggest that while the agreement to arbitrate disputes is an "old ship", we are sailing with new charts which still require each skipper to set his course on each voyage without many navigational aids. Often the best he will be able to do in deciding his course in any case is to look to those commercial or labor arbitration rules which may exist and apply to the jurisdictional sea involved. They will supply at least minimum guides to what he may expect to encounter.

Insurance: Attorney's Fees In Arbitration Pursuant To Uninsured Motorist Policy Provisions

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THE "Uninsured Motorist" rider to automobile liability insurance contracts was devised to replace and forestall compulsory insurance and to provide owners and occupants of automobiles a recovery for injuries sustained by reason of the negligence of financially irresponsible and uninsured motorists. And since it was realized that the claims would be by insureds against their own insurers, and the many considerations dictated by expeditious, inexpensive and final disposition of any claims, disputed or otherwise, arbitration was decided upon as the mode of resolution of any conflicts or issues.[1] It was intended to cover, in effect, the irresponsible automobile owners and operators of vehicles with amounts of indemnification for the benefit of the injured insureds up to, but not in excess of, the Financial Responsibility statutory requirements of the respective states.[2]

The endorsement either entitled "Uninsured Motorist Endorsement", or "Family Protection Endorsement" or some other such name, usually contains the following provision:

> 6. ARBITRATION. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this endorsement, then upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by such award made by the arbitrators pursuant to this endorsement.

This policy endorsement is usually attached to and made a part of the automobile liability insurance policy of an automobile owner and contains its own definitions of "insureds", "uninsured motorists" and is in legal effect a separate and divisible contract even though attached to another insurance policy.[3]

Florida has the following statute relative to Attorney's Fees in connection with insurance controversies:

> Upon the rendition of a *judgment* or *decree* by any of the courts of this state against an insurer in favor of an insured or the named beneficiary under a policy or contract executed by the insurer, the trial judge shall adjudge or decree against the insurer and in favor of the insured or beneficiary, a reasonable sum as fees or compensation for the insured's or bene-

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[1]George, Calvin M., Insuring Injuries Caused by Uninsured Motorists, Nov. 1956 INS. L.J. 715-719; Moser, Henry S., The Uninsured Motorist Endorsement, Nov. 1956 INS. L.J. 719-722; Plummer, Albert L., Handling Claims Under The Uninsured Motorist Coverage, Aug. 1957 INS. L.J. 494-496; 508-510, 1957 A.B.A. Sec. Ins., Negl. and Comp. 30-36.

[2]As an example of the Financial Responsibility requirements in Florida see F.S.A. Chapter 324.

[3]While there is no known court decision expressly upon this point as to the Uninsured Motorist Endorsement, (probably since this is so apparently obvious) it is certain that under the principles set forth in Sec. 336 "Entire or Severable Contracts, 44 C.J.S. 1284-1287, the courts would determine that this endorsement is a separate contract unrelated to or influenced by the insurance policy to which it is attached.

ficiary's attorney prosecuting the suit in which the recovery is had. . . .[4]

The primary question is, assuming that an insured is in fact an "insured" under the terms of this policy, and further assuming that a claim has been duly filed with the insurer which has denied liability and even has denied the amount claimed by the insured, can the "insured", claimant, in the arbitration proceedings pursuant to the policy provisions, recover attorney's fees in his award?

This statute[5] has been construed as intended to discourage insurance companies from contesting insurance policies in Florida *courts*[6] and imposes a penalty against a delinquent insurance company[7] and must be strictly construed.[8]

At common law there is no inherent right to have attorney's fees awarded or paid by the opposing side, in the absence of contract, statute or recognized ground of equity.[9]

The answer must obviously be that the claimant in arbitration cannot recover attorney's fees under the common law, unless there is a contractual provision either in the agreement providing for arbitration or under rules of the American Arbitration Association to which the parties agreed, as above indicated. Also, unless there is a statute which allows attorney's fees to be assessed in arbitration proceedings, there can be no recovery therein.[10] Further, the mere submission of disputes to arbitration is not "such a recognized ground of equity".

The quoted Florida statute, as to attorneys fees, applies to "judgment" or "decree" by any of the "courts" of the state and the "trial judge" shall adjudge the amount of the "attorney's fees".

Arbitration is not a "court". It is as old as the legal concept of courts and is apart therefrom. "Trial Courts" as used in Article V of the Florida Constitution has been held to mean courts other than appellate courts. In using such words the conclusion is inescapable that it is meant to describe competent tribunals under the laws of a state authorized to examine, or cause to be examined the facts put in issue in a cause for the purpose of determining such issue. An administrative individual, board or bureau is not such a "court". Controversies not in "court" established as part of the judicial system of a state is not a "case".[11]

The arbitration tribunal is not a "court", especially within the contemplation of the Florida constitutional provisions pertaining to the "courts" of the state. The ancient practice of "arbitration" in its broad sense, is a substitution, by consent or agreement of the parties, of a tribunal for the "courts" provided by the ordinary process of law, and the object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.[12]

Arbitration is not a "court" under any aspect of the device.[13] It is an ancient practice and existed at common law long before the enactment of any statutes on the subject and, unless the common law has been abrogated by legislative act, parties are still at liberty to enter into submission as at common law.[14]

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[4]F.S.A. Sec. 627.0127 (Sec. 477, Ch. 59-205) which replaced Sec. 625.08, the pertinent portions of which are not affected by the amendment as the same pertains to this matter. (Emphasis added.)

[5]Feller v. Equitable Life Ass. Soc., 57 So.2d 581 (Fla. 1952).

[6]Ibid.

[7]The statute is in the nature of a penalty: U.S. Fire Ins. Co. v. Dickerson, 82 Fla. 442, 90 So. 613 (1921); Pendas v. Equitable Life Ass. Co., 129 Fla. 253, 176 So. 104 (1937), 112 A.L.R. 1051; and see text and cases in 46 C.J.S. Secs. 1405-1409 and 29 Am. Jur. Sec. 1270.

[8]Main v. Ben. Foster Co., 141 Fla. 91, 192 So. 602 (1939), 126 A.L.R. 1434; and text and cases cited in note 7 *supra*, as to strict construction.

[9]Johnson v. Gerald, 216 Ala. 581, 113 So. 447, 59 A.L.R. 348; Gullette v. Ochoa. 104 So.2d 799 (Fla. 1958); Webb v. Scott, 176 So. 442; 129 Fla. 111 (1937); Ex Parte Grham, 186 So. 202, 136 Fla. 20 (1939); Phoenix Indem. Co. v. Union Finance Co., 14 So.2d 188 (Fla. 1951); Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956).

[10]F.S.A. Chapters 57 and 58.

[11]Boyd v. County of Dade, 123 So.2d 323 (Fla. 1960), State v. Furen, 118 So.2d 6 (Fla. 1960).

[12]Carpenter v. Bloomer, 54 N.J. Super. 157, 148 A. 2d 497, (N.J. 1959). During the pendency of an action between the parties, a consent order was entered in the cause submitting the matter to arbitration for determination. Upon coming in of the the arbitrator's award, the court proceeded to enter a judgment upon the award and assess costs, attorneys fees and payment of recorder's fees. On appeal, distinction between reference to "referee" or "master" and arbitration were examined and it was held that upon the agreement (by consent order) to submit to arbitration, the court lost all jurisdiction over the subject matter and could not order or award attorneys fees unless there was an agreement to that effect in the arbitration agreement, or in the state statute.

[13]Temple v. Riverland Co., 228 SW 605, 608 (Tex.); T. J. Stevenson & Company v. Int'l Coal Co. 185, N.Y.S.2d 599, 602, 15 Misc.2d 904 (N.Y.); Eastern Eng. Co. v. Ocean City, 11 N.J. Misc, 508, 510-511, 167 Atl. 522, 523, (S. Ct. 1933); 3 Am. Jur., Arbitration & Award Sec. 2; 6 C.J.S., Arbitration & Award Sec.

[14]See note 12 *supra;* F.S.A. Chap. 57.

Where the parties do not proceed under the terms of any specific statute, such as the Florida Statute,[15] they are controlled by their contract and the common law as to arbitration and are bound thereby.

The proceedings between the parties cannot even be considered as a "reference" in its legal conception, since there is no "cause of action pending" in any court of competent jurisdiction either at the time of the making of the "arbitration agreement" (which is the insurance policy) nor at the time of the filing of the claim with the American Arbitration Association.[16] In fact the filing of the claim or statement of claim with the American Arbitration Association was an act of confirmation of the arbitration agreement outside of the statute.

Therefore, unless there was agreement between the parties, or some provision within the rules and regulations of the American Arbitration Association which so expressly provided, there can be no allowance or award for attorney's fees in favor of the insured claimant.[17] Section 52 of the Rules of the American Arbitration Association (which are part of the arbitration agreement of the parties) provides that the arbitrator shall interpret and apply the rules insofar as they relate to his powers and duties. There is no express provision, nor is there any provision from which it can be implied, that the parties agreed, that the claimant, if successful, shall be entitled to any attorney's fees. In fact, if the purposes of the drafting of the policy provision with relation to arbitration are considered, the only conclusion that can be reached is that all the delays, costs, incidents of "trials" or "court" actions were to be avoided and the device of arbitration with all its implied advantages were to be relied upon.[18]

Even if the arbitration award is submitted to a court to have a judgment entered thereon, pursuant to the agreement of the parties or the statute in effect, the court cannot award either attorney's fees or arbitrator's fees for any of the services rendered up to and including the rendition of the final award.[19] The statute expressly excludes "counsel fees". It provides that, unless provided otherwise by agreement or provision for arbitration, "the arbitrator's fees and expenses, together with other expenses, *NOT INCLUDING COUNSEL FEES* . . . . . shall be paid *as provided in the award*.[20] This is not authority for the court to award attorney's fees, it is an express exclusion, and even as to the expenses and arbitrator's fees, it cannot assess them or make an independent determination relative thereto but can only order payment of what was awarded by the arbitrator.

There being no provision for attorney's fees in the agreement of arbitration, nor the rules of the American Arbitration Association, also, there being no applicable statutory provision, the arbitration tribunal not being a "court" nor the arbitrator a "judge", there can be no award of attorney's fees by the arbitrator in an Uninsured Motorist Arbitration Proceeding.

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[15] F.S.A. Chap. 57.

[16] Note 12 *supra*.

[17] Note 10 *supra;* Secs. 48 and 49 of Rules of American Arbitration Association, which provide that when oral hearing is waived the only fees shall be the initial fee of the association but that when oral hearing is had, witness fees shall be paid by the party procuring the witness, cost of transcript and stenographic record shall be prorated equally among the parties, all other expenses shall be borne equally by the parties unless they agree otherwise or unless the Arbitrator assesses them against either of the parties.

[18] Note 1 *supra*.

[19] Note 12 *supra* and note 10 *supra*.

[20] F.S.A. Sec. 57.20.

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

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Trauma Or Strain And Heart Disease Causal Relationship*

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"CAUSAL RELATIONSHIP of trauma to heart disease may exist under the following circumstances: Sudden death from acute coronary disease (or coronary occlusion with myocardial infarction, or acute coronary insufficiency) in which symptoms devolop during the course of or immediately following exertion or strain that is both excessive and unusual for the particular individual concerned; this exertion or strain may be either physical or emotional."

The foregoing is a quotation from a guide for physicians regarding the relationship of trauma or strain to heart disease, developed by a special committee of the Washington State Heart Association. It was formulated in an attempt to clarify some of the problems of the cardiac under Workmen's Compensation laws.

This is a broad field which can be narrowed for purposes of this discussion, since we are dealing with coronary artery disease in most cases. That this is true is indicated by experience such as that of Texon,[14] who noted that 78 of 100 Workmen's Compensation claims based on heart damage were due to coronary artery disease. A review of claims in the ten years 1950-59 under industrial insurance law of the state of Washington showed that in 316 of the 401 cases (77 per cent) in which a claim of cardiac damage was made, the problem was acute myocardial infarction or acute coronary insufficiency; and excessive or unusual effort was the alleged cause of the cardiac accident.

Although excessive effort may produce congestive failure if there is preexisting heart disease, this is an uncommon cause of cardiac claims. Industrially-related cerebral vascular accidents, secondary to hypertension, are also relatively uncommon. Although trauma to the chest, either penetrating or nonpenetrating, may injure the heart or cause death, cases of this kind make up a small portion of the total claims based on cardiac damage (less than 1 per cent of the Washington cases) and therefore will not be discussed here.

In light of the foregoing, the comments will be restricted to the effects of effort, stress or strain in precipitating cardiac accidents in persons with preexisting coronary atherosclerosis. Preexisting coronary disease has been specified, since it is generally agreed that even great stress or effort rarely harms the normal heart. It should be noted that the omission of cardiovascular diseases other than effort-related myocardial infarction from this discussion does not imply that in individual cases these other conditions are less important or that claims related to them less difficult to decide.

Almost everyone who has been interested in the Workmen's Compensation problems has been struck by the apparent disparity in the opinions of physicians, compensation administrators and courts as to the relationship of effort at work to heart disease.

*Reprinted by permission from CALIFORNIA MEDICINE, Vol. 94, No. 2, issue of February, 1961.

It is generally agreed that this variation in opinion stems from a lack of agreement among physicians as to when a given effort may have played a significant role in precipitating a heart attack or death. That there should be such disagreement is not strange, for the problem is a complicated one—the possible aggravating effect of a given stress on a progressive, degenerative disease which, in its natural course, is often punctuated by sudden worsening in the form of myocardial infarction or sudden death. What the factors are that precipitate coronary occlusion or sudden death is poorly understood. In most cases such attacks occur without a recognized significant event in the individual's activity or environment and, as a matter of fact, occur not uncommonly during sleep. A decision as to whether there is relation between a given effort at work and subsequent heart attack or death is made even more difficult by the observation of pathologists that a coronary occlusion may require hours or days to develop to the point of symptoms. The activities of the worker immediately before the onset of symptoms, therefore, may be unimportant in the process.

It is well to remember that there are two different problems involved—one related to the underlying atherosclerosis, the other to the thrombotic or occlusive complications of this process. With the rare exception of cor pulmonale, secondary to job-related pneumoconiosis, no occupational heart disease is recognized. However, there have been suggestions for some years that certain aspects of some jobs, particularly as they relate to emotional stress, may accelerate the development of atherosclerosis.[2] Proponents of this theory point out that stress may cause an elevation of serum cholesterol, which may accelerate the development of atherosclerosis. In addition, stress may cause an increase in pulse rate, cardiac output and blood pressure. Other as yet undefined ill effects of tension are also suspected. Friedman[2] and Russek[11] described a personality pattern common to young men with coronary disease, and emphasized the importance of occupational and other forms of stress in the development of coronary atherosclerosis. However, others are skeptical of the importance of emotional factors[6,13] and the question remains unanswered. Even assuming it may yet be proved that emotional stress hastens the process of atherosclerosis, it does not seem to deserve weighty consideration in a discussion of job-related heart disease, for these reasons: Atherosclerosis takes years to develop, and emotional tension is only one of many factors apparently affecting its development; there are many sources of stress in a given worker's life, some of which are totally unrelated to his job; it is difficult to qualify degrees of stress; and, as noted by Russek,[11] the individual's emotional reaction to his job is more important than his job classification, an observation supported by Pell and D'Alonzo,[9] who failed to find an increased prevalence of coronary disease in executive and managerial personnel, presumably subject to a greater responsibility and, therefore, stress.

It would appear that stresses and responsibilities that would be intolerable for one person are but a pleasant challenge to another. Although as physicians we consider emotional stress among other factors when advising patients regarding jobs, we are not justified in saying that any group of jobs, because of the emotional stress that may be involved, is harmful to people who have coronary heart disease. In addition, until we know much more of the causation of atherosclerosis, we must be very cautious in compensation cases about concluding that the continuing emotional stresses of a particular job over a period of years accelerated an atherosclerotic process and led to a heart attack or death sooner than it might otherwise have occurred.

In recent years, attention has been directed toward the effect of exercise on the atherosclerotic process. A widely quoted study is that of Morris and co-workers,[7] who compared the development of coronary disease in bus drivers with that in bus conductors, and in postmen with that in persons in sedentary jobs in the Postal Department of Great Britain. They believed their study proved that men in physically active jobs have a lower incidence of coronary heart disease in middle age than have men in physically inactive jobs, and also that the disease was not so severe in physically active workers. Other investigators who have done similar epidemiological studies have expressed the belief that additional factors, such as diet and emotions,[3,4] were more important determinants of atherosclerosis than exercise. However, as far as the topic of the moment is concerned, there is no evidence that moderate or even strenuous exercise over many years has a harmful effect on the course of atherosclerosis. Actually, the reverse seems to be true. It must be added that exercise of any degree may produce an-

gina if the coronary artery is too narrowed to compensate for it.

The chief problem for discussion here is the relationship of physical or emotional stress to acute myocardial infarction. Information on this is available in two areas: (1) The physiological effects of stress upon atherosclerotic coronary arteries, and (2) epidemiological studies correlating attacks of myocardial infarction with antecedent physical activities and emotional stresses.

There are great deficiencies in knowledge of both areas. Admitting these deficiencies, let us consider the mechanisms of coronary occlusion and myocardial infarction in order to determine whether they may be influenced by effort or stress. Coronary occlusion in the majority of instances occurs in one of three ways, by progressive intimal thickening, as a phenomenon secondary to intimal hemorrhage and by intraluminal thrombosis. It is agreed that all these processes occur as a part of the disease process and usually with little relation to the patient's environment. The question is whether any of them may be produced or significantly influenced by environmental conditions.

Since reference has already been made to the lack of convincing evidence that atherosclerosis is a job-related disease, the matter of intimal thickening needs no further discussion.

Paterson[10] has been the leading exponent of the proposition that frequency and degree of intimal hemorrhage are important factors in coronary occlusion. He said it can be demonstrated that most intimal capillaries arise directly from the lumen of coronary arteries and not from vasa vasorum in the adventitia. This being true, he said, increases in systemic pressure are transmitted directly to such capillaries; therefore, increase in blood pressure secondary to physical exertion or emotional stress may rupture such capillaries, leading to significant thickening of the intima and in some cases to actual occlusion of the coronary artery. Even if occlusion does not occur, Paterson said, a thrombus may form on the overlying and altered endothelium. He noted such intimal hemorrhage at autopsy in 87 per cent of 58 cases of death from coronary occlusions and, on the basis of the foregoing reasoning, he expressed belief that coronary occlusion is often the result of physical exertion or emotional stress. Other investigators have not found so high an incidence of intimal hemorrhage and have expressed doubt it is as common a cause of coronary occlusion as Paterson believes. Yater and associates,[20] for example, found evidence of recent intimal hemorrhage in the coronary artery in only 6 per cent of 450 soldiers who died of acute coronary artery disease. Some other pathologists believe that intimal capillaries arise from vasa vasorum and are, therefore, not as susceptible to changes in systemic pressure as Paterson[10] suggested. Further, it is agreed that intimal hemorrhage often occurs as a part of the disease process without regard to stress or strain.

Although coronary thrombosis has occurred clinically in association with physical or emotional stress often enough to suggest a causal relationship, it has been difficult to explain the possible connection. At least three mechanisms have been proposed in addition to changes which may occur secondary to an intimal hemorrhage. One of the oldest such suggestions is rupture of an atheroma into the lumen of the coronary artery, leaving a rough spot on the intima on which a thrombus forms. The way in which effort causes the rupture has not been adequately explained although the factors described by Texon,[15] and referred to below, may be relevant. Evidence against this hypothesis is the lack of pathological proof that it occurs. Several observers have demonstrated an increased coagulability of the blood during acute emotional stress and have offered this as one of the causes of coronary thrombosis at such times.[2] Lastly, Texon[15] recently described the hemodynamic factors which not only influence the localization of atherosclerotic lesions but may even initiate the occlusive event. He referred to Bernoulli's theorem that fluid in motion possesses energy by virtue of its velocity and pressure. The static pressure plus the velocity pressure are constant as fluid flows in a tube of uniform size. However, according to Texon's concept, if there is narrowing at one point, the velocity increases and the static pressure falls correspondingly. The fall in static pressure at such a point produces a negative pressure or "suction" effect which stimulates intimal thickening and atherosclerotic plaque formation in this area. When degenerative changes in the plaque have progressed to a critical degree, an increase in velocity may increase the suction effect enough to detach the intimal layer and lead to thrombosis at this point. Such an increased velocity might occur with physical effort or emotional stress. Thus, we have four mechanisms which, theoretically, could lead to coronary

thrombosis and occlusion. It should be kept in mind that even if stress initiated thrombus formation, it might take hours or days for narrowing to progress enough to cause symptoms.

The relation of coronary insufficiency to stress is easier to visualize. This is an extension of the process which produces angina pectoris but in which more prolonged disproportion between blood flow through the coronary arteries and blood needs of the myocardium leads to permanent, usually focal, myocardial necrosis. It occurs in the presence of preexisting coronary atherosclerosis which may have been unrecognized. It may, of course, be produced by anything that increases cardiac work, including physical effort or emotional stress, in addition to a number of conditions leading to decreased coronary flow, such as shock, hemorrhage and arrhythmia. It is generally agreed that this is a mechanism by which severe and prolonged effort or stress may lead to myocardial infarction even in the absence of coronary occlusion.

There are many statistical studies on the relationship of effort to myocardial infarction, among which the most widely quoted are those of Master,[5] purporting to show no relationship between effort and coronary occlusion, and those of French and Dock[3] and Yater and coworkers[20] suggesting there is relationship between unusual physical effort and myocardial infarction. Suffice it to say this is a subject which lends itself to bias and strong opinion, depending on the author's background and approach. The facts are few, the opinions many, divergent and often not entirely objective.

The American Heart Association, through its rehabilitation program, has been much interested in this program, since fear of increased costs under industrial insurance acts has been one of the deterrents to employment of persons with heart disease. There are two committees of the American Heart Association working on the problem, the Trauma and Strain Committee and the Medical, Legal and Insurance Committee.

The Trauma and Strain Committee has three projects under way:

1. The careful pathological examination of sudden deaths of heart disease in New York City correlated with the circumstances before death.[18]

2. A clinical study of the relation of events at work to heart attacks in a large New York industry.

3. A comprehensive investigation of legal procedures involved in decisions in compensation claims based on heart damage all over the United States.

Completion of the first two studies will shed more light on the possible relation of stress and strain to heart attack but cannot be expected to solve the problem.

Although the ultimate truths in this matter will probably elude us for some years, today's compensation cases based on allegation of heart damage cannot be postponed, and since the present methods of arriving at a decision in such cases are often unsatisfactory and unjust, some states have attempted to develop more logical and equitable procedures for handling compensation claims of this kind. Such attempts may be classified under four headings:

1. Development of medical criteria for the relationship of strain to heart disease;

2. Setting up of expert and unbiased panels to make such decisions;

3. Amendments to existing laws;

4. Improvement of application of existing laws.

Under Point 4 should be mentioned the improvement of rehabilitative efforts for cardiac claimants under Workmen's Compensation. There may well be other approaches.

In 1952, under the stimulus of the chairman of the Industrial Commission of the State of Utah, a group of internists in the Salt Lake area formulated criteria for the relation of strain to heart disease[16] which were accepted by their colleagues. In addition, they set up a system whereby each claim based on allegation of cardiac injury was examined by two or more experts from a panel chosen by the industrial commissioner from a list of specialists in that field that was submitted by the Utah State Medical Association.

After careful examination of the claimant by the panel, an opinion was submitted as to causal relation, this opinion being available before litigation occurred. According to Dr. L. E. Viko, one of the men chiefly responsible for the Utah plan and chairman of the cardiac panel, "Medical findings and Commission decisions are now reasonably consistent," and "knowledge of this has led to a marked decrease of the number of unreasonable claims." According to Industrial Commissioner O. A. Wiesley[19] of Utah, "Fear, suspicion, bias and hatred have been eliminated because expert, honest, medical opinion is available to both parties

at no cost." Formal hearings by the Utah Industrial Commission have been decreased from an average of 300 a year to 40.

Similar criteria for the relation of strain to heart disease were formulated in the State of Washington in 1955 and a guide for physicians was published.[17] These criteria, a part of which has been quoted, have been approved by the three societies of internal medicine in the State of Washington and have been discussed in most of the county medical societies. The criteria are commonly referred to in heart disease compensation cases in Washington. The Department of Labor and Industries sends a copy of them with the file on each case related to heart disease to serve the examining physician as a guide in making his decision.

A panel of interested and qualified internists has been set up through the Washington State Heart Association and the Washington Society of Internal Medicine. Two or more of these panelists in different localities are selected by the Department to examine the living claimant or the file of the deceased. The panel decision has no legal status in Washington but, from our observations, appears to be usually accepted by the Department as the basis for its decision. It should be emphasized that the Heart Association became involved in the medico-legal problem through its rehabilitation program; that it is not for or against claimant or employer but is interested in a prompt and fair settlement of cardiac claims.

Three years ago, Oklahoma cardiologists drew up similar criteria[8] and distributed them to physicians in the state. Many states, of course, have procedures for using expert and impartial panels for review of accident claims in all fields of medicine.

Early in the Heart Association's investigation of the workmen's compensation situation in Washington, it was noted that some competent physicians were offering opinions as to causal relation that did not accord with accepted medical thought. When confronted with such opinions, their explanations often were based on their interpretation of the law (usually wrong) or their recognition of the financial needs of the claimant or survivors. Legal consultants have made it clear that as physicians we should make our judgments on purely medical grounds and should not warp our conclusions to thwart the law or to meet an economic need. This is a good rule to remember: We should practice medicine and let the courts interpret the law. If the laws are inadequate or unjust, we should by other means attempt to influence a change through our legislators.

It would, of course, be desirable to know whether this combination of medical criteria and panel examinations does improve the application of the Workmen's Compensation Law in cardiac cases. If it is successful, it should lead to more uniform medical opinion regarding the effect of stress on the heart, to a reduction in the proportion of such cases proceeding to litigation, to prompter settlement of claims, to aggressive rehabilitation efforts and, lastly and most important, to better employment opportunities for persons with heart disease. Since there are many influences besides those of physicians that bear on the way workmen's compensation laws are administered, it is difficult to assess the relative importance of each. However, the Heart Association's committee has been encouraged by acceptance given to its efforts by physicians, administrators of the law, employers, labor unions and others. A study is under way in Washington reviewing cardiac claims since 1950 which will better evaluate the problem. One preliminary and interesting bit of evidence from this study is as follows: "There has been an almost steady decrease in the total number of accepted cardiac compensation cases, from 124 in 1950 to 68 in 1957."[12] This decrease stands in contrast to an increase in such cases reported in New York State and to frequent statements that such cases are increasing throughout the country. We who are working on the study were surprised to find this diminishing number of cases and, as yet, are unable to explain it satisfactorily.

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Fusion Of Vertebrae Following Resection Of Intervertebral Disc*

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THE ideal surgical treatment of disease of the intervertebral disc is still under discussion. Combination of discoidectomy with bone-graft fusion of the spine has been recommended in order to diminish the frequency of unsatisfactory sequelae following operative treatment of the degenerated intervertebral disc.[4,13] Dandy,[9,10] however, stated that "spinal fusion in disc cases is absolutely unnecessary; all one has to do is curette out the nucleus pulposus and the joint will fuse itself." This statement, so far as we know, was not yet confirmed by postmortem examination in man. It is, therefore, the purpose of this communication to present 2 cases in which radical discoidectomy by itself was followed by vertebral fusion.

CASE REPORTS

Case 1. S.L., a 48-year-old male mineral surveyor, was admitted to the Montreal Neurological Institute in 1948 complaining of severe low-back pain with right sciatic radiation and weakness of dorsiflexion of the right foot. His back had been stiff as long as he could remember and, for the previous 17 years, progressively more severe attacks of low-back pain were experienced. Three months before admission, while lifting a heavy object, an excruciatingly severe low-back pain developed suddenly and within 2 weeks radiated intermittently to the right ankle, across the foot to the big toe. Sensory or sphincter disturbances were not present. The pain had subsided somewhat 10 days before admission.

Examination. The right pelvic brim was tilted upward. Marked spasm of lumbar paravertebral muscles and pain prevented flexion of the spine. Straight-leg raising was limited to 40° on the right and to 70° on the left. The right anterior tibial group of muscles was weak. Reflexes and sensory findings were reported as normal.

Roentgenograms of the spine showed a narrow L4-L5 interspace. Myelography suggested rightsided, posterolateral protrusion of the discs at the L3-L4 and L4-L5 levels.

Operation (Dr. W. V. Cone), Sept. 12, 1948. With the patient prone and the back sharply flexed at the iliac crests, spinal and local anesthesia were administered. The paraspinal muscles were reflected subperiosteally through a midline incision. The spines and laminae were thus exposed bilaterally from the 3rd to the 5th lumbar segment. The right laminae of L3, L4 and L5 were partially resected. The ligamentum flavum was removed completely between these levels to the right of the midline. A "bulging" disc was found impinging on the 4th lumbar root. The right 5th root, in turn, was found to be compressed by a sequestrum of nucleus pulposus protruding through the annulus fibrosus. The space between the roots and the annulus contained a moderately heavy amount of scar tissue. The contents of the L3-L4 and L-4-L5 interspaces were evacuated to the greatest extent allowed by the unilateral approach. The hyaline cartilage was removed following curettement. The roots were further decompressed by removal of adjacent capsular ligament, annulus fibrosus and granulation tissue. The apophyseal joints were not further disturbed. The wound was closed with interrupted wire sutures.

Microscopic Report. Sections of the excised tissue revealed typical degenerated nucleus pulposus, hyaline and fibrocartilage.

Postoperative Course. The patient was allowed to stand on the day after operation and by the 2nd day was performing intensive lumbar tension-and-extension exercises. His recovery was uneventful except for the appearance of a small operative hematoma which was aspirated. At time of discharge mild weakness of dorsiflexion of the right foot persisted and the right ankle jerk was diminished. Both the patient and his wife judged the result of the operation to be excellent.

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FIG. 1. *Case 1.* Sagittal section of lower lumbar and sacral spine. Beginning bony union was found at L3-L4 and L4-L5 levels which had been curetted. A degenerated disc was present at L5-S1 interspace which had not been operated upon.

Twenty months after the discoidectomy, he was readmitted with complaints of generalized seizures, headache and aphasia of 6 weeks' duration. At a frontal craniotomy a large neoplasm was found. He expired 3 days after operation.

Pathological Examination. The neoplasm removed at craniotomy and subsequent autopsy was a widely disseminated malignant melanoma of unknown primary source.

The lumbosacral spine was removed intact and fixed in 10 per cent formalin (by Dr. J. Roth). Subsequently, the specimen was sectioned in two parasagittal planes with a bandsaw. Blocks were also cut through the interspaces and the apophyscal joints in preparation for microscopic study.

The interspaces at L3-L4 and L4-L5 measured 5 mm. each and were joined by firm fibrous connective tissue and small spicules of bone connecting with the spongiosa of the vertebral bodies (Fig. 1). The mechanical stability at these two levels was excellent. The apophyseal joints at both levels revealed a narrow interspace and eroded cartilage indicative of early arthrodesis. The intervertebral foramina were quite adequate in size to allow free space for the nerve roots.

At the lumbosacral junction, the picture was different. Here a herniated disc protruded through a tear in the annulus fibrosus. The interspace was only mildly narrowed and contained loose, vascular connective tissue and cartilaginous debris. Mecanical stability was poor. The facets, however, appeared normal.

Case 2. G.F., a 57-year-old housewife, was admitted to the Montreal Neurological Institute in 1944 with complaints of severe low-back pain with right sciatic distribution of 2 weeks' duration. She had had intermittent attacks of lumbago since the age of 18. Three weeks before admission she slipped and fell. Severe low-back pain ensued which was soon aggravated by radiation of the pain to the right heel on any movement. In the pain-free intervals, paresthesias of numbness and tingling were noticed in the posterior part of the right thigh and calf.

Examination. There was severe spasm of the paravertebral muscles in the lumbosacral region. Straight-leg raising was diminished to 60° on the right. An L5 and S1 dermatome hypalgesia and a diminished ankle jerk were found on the right side. The right calf and anterior tibial groups of muscles were weak.

Myelography demonstrated a definite right, posterolateral herniation of the intervertebral disc at the L4-L5 level. The possibility of a herniation between L5 and the sacrum was also considered.

Operation (Dr. W. V. Cone), Dec. 6, 1944. The patient was placed prone with her back sharply flexed at the iliac crests. Under spinal and local anesthesia, a low midline, lumbar incision was made. The laminae to the right of the midline were exposed from L3 to the sacrum. Partial laminectomies were performed at the L4-L5 and L5-S1 levels. The interlaminal space was narrow and the laminal alignment was abnormal between L4 and L5, resulting in compression of the ligamentum flavum. The ligamentum flavum was removed completely at both levels. An unusually large sequestrum of disc tissue herniated into the spinal canal below the edge of the 5th lumbar vertebra. The lumbosacral junction appeared entirely normal. The articular capsule adjacent to the L5 root was resected, resulting in wide decompression of the nerve

root. The joints were not further disturbed. The L4-L5 intervertebral space was entered by sharp dissection through the posterior intervertebral ligament and annulus fibrosus. The contents of the interspace were evacuated to the greatest possible extent from the unilateral approach. The opposing surfaces of the vertebral bodies were curetted until cancellous, bleeding bone was encountered and all hyaline cartilage was removed.

Microscopic Report. The tissue excised consisted of fibrocartilage and fibrous connective tissue.

Postoperative Course. Recovery was impeded by the simultaneous onset of menopausal symptoms. As usual, ambulation was instituted on the 1st day after operation together with an active regimen of physiotherapy consisting mainly of exercises in extension. There was no evidence of infection of the wound or other inflammatory process in the interspace. By the time of discharge, the mobility of the spine was greatly improved and weakness had disappeared.

She was seen frequently in the ensuing years by members of the staff of the Montreal Neurological Institute during admissions to the Royal Victoria Hospital primarily for symptoms of generalized arteriosclerosis. Her only complaint relative to the operation was a consciousness of the lower part of the back after prolonged sitting. The findings of the most recent neurological examination (6 months before death) were normal except for the absence of both ankle jerks. In November, 1955, 11 years after her discoidectomy, the patient succumbed.

Pathological Examination. Autopsy disclosed the presence of arteriosclerotic cardiovascular disease, an old myocardial infarction with a mural thrombus and thrombotic occlusion of the superior mesenteric artery.

The lumbosacral spine was removed intact. After fixation in 10 per cent formalin, the specimen was sectioned in the midsagittal and one parasagittal plane to each side of the midline with a carpenter's bandsaw.

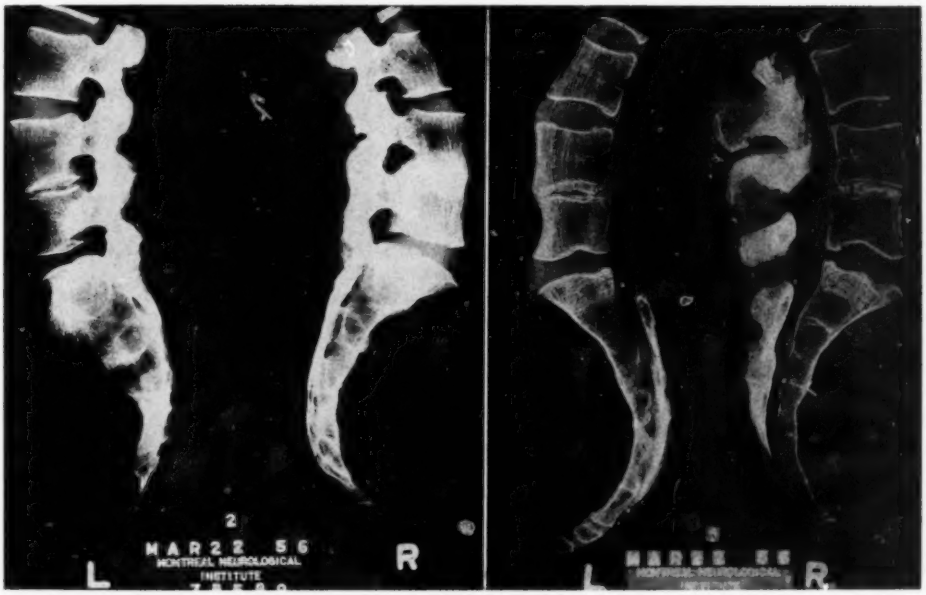
The fusion is shown clearly in both the radiographs and the photographs of the sections (Figs. 2, 3 and 4). It was noted that the ankylosis was much more complete on the side of the discoidectomy. The sections of the apophyseal joints showed traversing trabeculae of bone indicating total arthrodesis. The right L4-L5 intervertebral foramen measured 3 mm. less in diameter than the adjacent or opposite foramina (Figs. 5 and 6). There was no significant scarring or deposition of fibrous tissue about the roots in the foraminal regions.

FIG. 2. *Case 2.* Parasagittal section to right of midline showing bony fusion at level of operation, L4-L5.

DISCUSSION

Healing by fusion following radical discoidectomy in these cases is similar to the results observed in studies of intervertebral-disc lesions in animals.

The intervertebral space of the rabbit was damaged by means of gross instrumentation by both Lob[21,22] and Schrader.[29] The animals were sacrificed 3 months following operation at which time bony and fibrous invasion was found at the affected interspaces. More recently, Smith and Walmsley[30] reported dense collagenous overgrowth at the site of the removed nucleus pulposus of the rabbit. Some ossification was present about the scars of the incision through the annulus fibrosus. In dogs, fibrosis and formation of bone appear in the interspace about 5 months after mechanical damage to and partial removal of a lumbar inter-



FIGS. 3 and 4. *Case 2. (Left)* Radiograph of median sagittal section. Note superiority of fusion on side of operation (right side).
(Right) Thin section radiograph to show trabeculae of bone traversing the interspace.

FIG. 5. *Case 2.* Section to right of midline to show intact articular facet at L5-S1 compared with fusion and remaining bit of cartilage at L4-L5 facet (arrow).

vertebral disc.[20,32,33] Tamman[33] correlated the degree of ingrowth of granulation tissue and ossification to the extent of the discoidectomies. The canine discoidectomies of Key and Ford[19] are of interest because the animals were sacrificed just 1 month after operation. The development of fusion could not be expected during such short postoperative survival, but the finding of ingrowth of vascular connective tissue probably represented the initial stage of healing. Haas,[14,15] attempting an experimental confirmation of Dandy's hypothesis relative to vertebral-body fusion, resected both the nucleus pulposus and the cartilaginous plates after curettement of the lumbar interspaces in dogs. His technique is directly comparable to that used in the discoidectomies of the presently described human cases. Within 4 or 5 months, bony fusion developed between the vertebral bodies. He noted that the rate of fusion was inversely proportional to the age of the animal. Islands of

disc tissue remaining from inadequate extirpation accompanied failures of total fusion.

The monkey serves as an appropriate subject for investigations of intervertebral-disc surgery because of the similarity of the static and dynamic forces acting upon its spine to those in man. Both Rabinovitch[26] and Jenkner *et al.*[18] reported firm, fibrous ankylosis following removal of only the nucleus pulposus. The vertebral bodies fused by bone after about 6 months if the cartilaginous plates were also curetted and removed. The extent of the fusion was found to depend upon the amount of cartilage removed.

These results indicate, therefore, that if only the nucleus pulposus is removed, the vertebral bodies will be joined only by fibrous connective tissue. This type of fusion is shown in the specimen removed at autopsy by Ott.[24] The prerequisite of bony fusion appears to be the removal of the cartilaginous plates from the vertebral bodies. A direct correlation seems to exist between the amount of disc tissue removed and the rate and completeness of the fusion.

In the cases presented herein, both the nucleus pulposus and the cartilaginous plates were removed. As may be predicted from the preceding brief review of the results of experimental surgery, the vertebral bodies were found to be fused at the affected interspaces at autopsy. The ankylosis was fully mature in the case of longer survival (Case 2), yet islands of disc tissue which could not be reached from the unilateral approach remained entrapped. In the patient in Case 1, who lived only 20 months after operation, a primarily fibrous fusion was found with good mechanical stability. Beginning signs of ossification were present as well. The clinical experience of Dandy[9,10] and Cone[6] has also indicated that fusion will result from total discoidectomy. Dandy reported 30 instances in which fusion at the site of a discoidectomy was confirmed at the time of subsequent reoperation for protrusion of discs at adjacent levels. The most important phase of the operation is the establishment of the optimum conditions for healing by fusion.[1,10,31] This is achieved by removal of a quantity of disc tissue sufficient to allow the spongiosa of the adjacent vertebral bodies to fall into close apposition. In the cases presented here, discoidectomy even from a unilateral approach sufficed for fusion; but to facilitate curetting and total removal of the disc, Cone later used a bilateral approach. Physical means, such as early ambulation and exercises commencing on the 1st postoperative day, are also employed in order to accelerate collapse of the interspace. On the other hand Foltz *et al.*,[12] using this technique of discoidectomy, were unable to demonstrate fusion in 16 patients operated upon.

FIG. 6. *Case 2.* Right side of specimen to illustrate size of intervertebral foramina.

Several objections have been raised against this procedure. First of all, doubt has been expressed that sufficient curetting is technically feasible to achieve fusion without damage to the roots or the dural sac.[5,19] The technique of radical curettement, however, has been used successfully not only by Cone and Dandy but also by Cloward[4] in a large number of cases. Cloward employs this technique in order to prepare the vertebral bodies for an intervertebral grafting procedure. The argument has also been raised that a decompression of the nerve root by the simple removal of the protruding sequestrum is in itself suf-

ficient treatment because the natural healing process also terminates in fusion. It has, indeed, been demonstrated that the end result of degeneration of the human intervertebral disc, whether caused by trauma, infection or excess strain imposed by congenital or acquired structural anomalies of the vertebral column, is also partial absorption of the intervertebral disc and bony fusion of the adjacent vertebral bodies. The scarcity of such fused spines in autopsy series is a reflection of the extreme slowness of the natural healing process. This seems to be hindered by the presence of residual cartilage and nucleus pulposus which are interposed between the vertebral bodies.[2,7,8,11,17,27,28,34] By the time effective fusion occurs under such conditions severe arthritic changes at the apophyseal joints may be caused by abnormal rocking and tilting movements between vertebrae that are deprived of the buffering action of an elastic, turgid disc. The resultant capsular hypertrophy may then embarrass the root between the disc and the capsule. A posterior spondylolisthesis may stretch the root over the superior articular facet of the underlying vertebra.[16,23] It is the aim of radical discoidectomy to effect firm stabilization before arthritic changes can develop. The fusion of the apophyseal joints in these autopsies is interpreted as the result of immobilization rather than of repeated trauma.

Another frequently mentioned criticism of radical discoidectomy is that collapse of the interspace causes a narrowing of the intervertebral foramina. To counteract this possible source of compression of the root, some techniques call for the insertion of bone pegs or cylinders into the curetted interspace in order to maintain the normal separation of the vertebral bodies when fused.[3,4,25,35] It was Dr. Cone's opinion that collapse of the interspace will not cause compression of the root if the surrounding soft tissue was resected adequately at the time of discoidectomy because the bony foramen, even with maximal collapse, remains sufficiently wide to transmit the root. In the 2 cases presented, and in many other similar instances,[6] there was no evidence of compression of the root following collapse of the interspace. Nor is fusion necessarily hastened by intervertebral grafting procedures. Such techniques also carry the danger of protrusion of the graft into the spinal canal, an increased likelihood of infection of the wound and a prolongation of postoperative disability.

SUMMARY AND CONCLUSIONS

Two autopsies are presented to illustrate vertebral-body fusion following radical discoidectomy. One case of a 20-month postoperative survival shows firm, fibrous ankylosis with beginning ossification. The other, of a 12-year survival, demonstrates mature bony union. In neither case was there any clinical or postmortem evidence of postoperative constriction of the root. Animal experiments indicating bony fusion following removal of intervertebral discs are discussed. The feasibility of nearly total discoidectomy to aid in preventing recurrent protrusion of the disc and to avert arthritic changes at the facets is emphasized.

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Abdominal Injuries*

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I WOULD like to discuss some of the aspects of abdominal injury considered to be important to proper treatment. These injuries are increasing in frequency, primarily because of the increasing incidence of automobile and pedestrian accidents. We hear a great deal about fatalities from automobile accidents but relatively little about nonfatal accidents and the people who have injuries that are less than lethal and who survive to be treated. Yet it is this group that is important to the physician, since it affords an opportunity to save a life and to restore the injured to health.

Specifically, I wish to make some remarks regarding the mechanisms of abdominal injury, the pathologic changes resulting from injury, the clinical manifestations, the important features leading to a correct diagnosis, and, finally, the treatment. With regard to treatment, it should be emphasized that once the diagnosis has been established and the patient properly resuscitated, treatment of specific intraabdominal injuries follows established surgical principles.

My remarks are based primarily on a large experience with abdominal injuries at the Charity Hospital in New Orleans. We not only have our share of irresponsible drivers, but unfortunately we also have people who engage in other types of irresponsible activity with lethal or semilethal weapons. Thus we encounter abdominal trauma in many forms.

Mechanisms of Abdominal Injury

Penetrating wounds are most often a result of ice picks and knives, firearms, flying objects and impalement (figure 1). Among these, ice picks and knives are the most fre-

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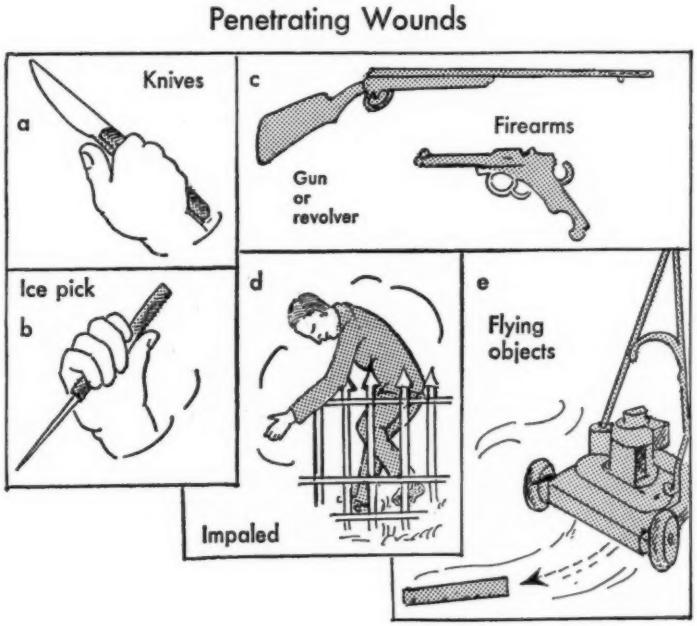

FIGURE 1. Common causes of penetrating wounds of the abdomen.

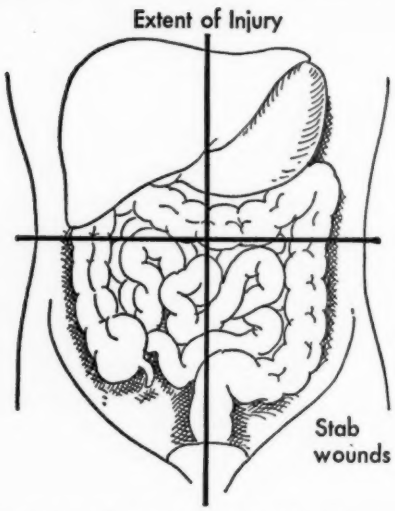

FIGURE 2. An abdominal injury resulting from a stab wound usually is confined to the quadrant in which the external wound is located.

quently encountered devices. Of wounds resulting from firearms, the most common are those due to pistol shot; injury resulting from rifle fire is extremely uncommon. Wounds due to flying objects are a result of the rotary power mower in most instances. Either a blade of the mower or a piece of stone or metal propelled by the rotary blade is responsible.

The extent of injury following a penetrating wound can be deduced to a considerable extent from the knowledge of the type of injuring agent. For instance, when a stab wound occurs the intraabdominal injury usually is confined to the abdominal quadrant in which the external wound is located (figure 2). To be sure, a "switch blade artist" may insert a knife into his victim and sweep the blade in a 90 to 100 degree arc, thus producing damage to structures in more than one abdominal quadrant. However, this is an exception. If a wound is due to a high-velocity missile, the tract of the missile usually is such that it involves more than one abdominal area and multiple visceral injuries result (figure 3). The course the missile takes is not always a straight line, since it may be deflected by certain tissues. Nevertheless, one can predict with reasonable accuracy the likelihood of involvement of intraabdominal structures from the location of the wounds of entrance and exit or from the location of the missile as observed on an x-ray.

Shotgun wounds of the abdomen are less common than pistol-shot wounds but are encountered occasionally as a result of hunting accidents. In this type of wound the pattern of injury is diffuse with the greatest injury occurring in the center of the pattern and decreasing severity of injury as the pe-

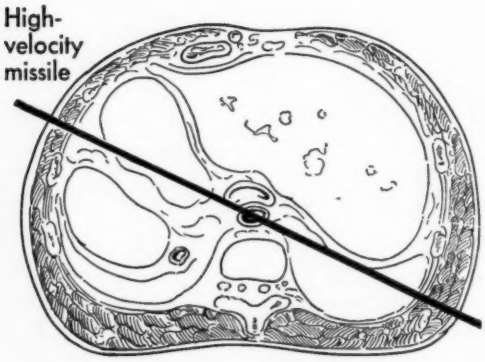

FIGURE 3. A wound due to a high-velocity missile usually involves multiple abdominal viscera. The missile's course is not always straight, but the entrance and exit wounds or the location of the missile as observed on an x-ray permits reasonably accurate prediction of structural involvement.

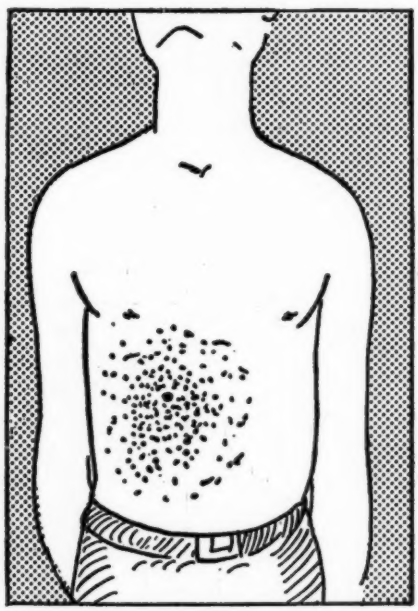

FIGURE 4. A shotgun wound produces a diffuse pattern of injury, most severe at the center and decreasing in severity toward the periphery.

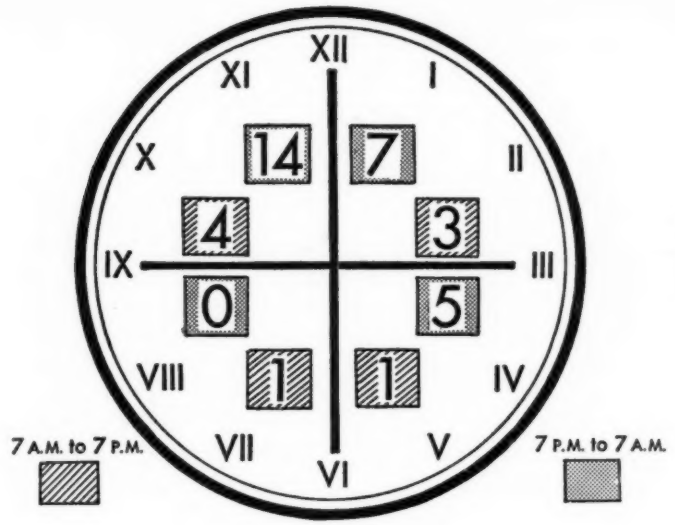

FIGURE 5. Chronologic pattern of a small series of gunshot wounds. Majority of the injuries occurred between 9 and 12 o'clock at night.

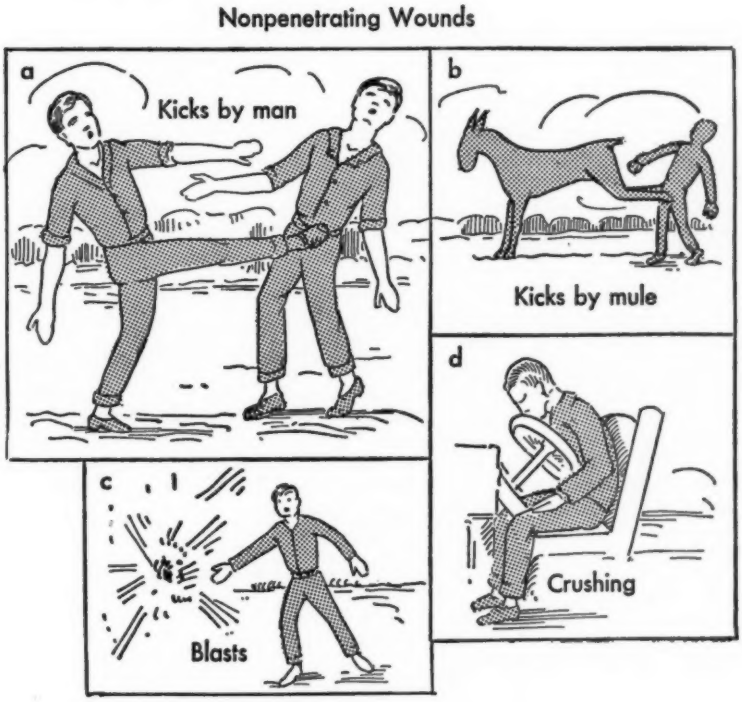

FIGURE 6. Common causes of nonpenetrating abdominal injuries.

riphery is approached. Although a shotgun wound may involve a rather extensive area on the abdominal or lower chest wall, the intraabdominal injury usually is not severe unless the shooting occurred at close range (figure 4).

It has been of interest to us to observe the seasonal and chronologic occurrence of gunshot wounds in our city. In reviewing a small series of these injuries we noted that a majority occur in the winter and between the hours of 9 o'clock in the evening and

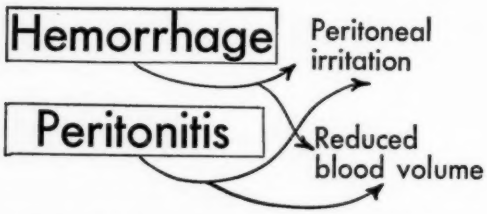

FIGURE 7. Primary effects of any abdominal injury.

midnight (figure 5). Gunshot wounds are least frequent in the fall and between the hours of 6 and 9 o'clock in the evening. You may infer from these data what you will!

Nonpenetrating injury of the abdomen may result from automobile accidents, explosive blasts, and kicks, either by man or by animals (figure 6). With the exception of kicks, the injuring force is applied diffusely, so that one can derive but little information regarding the sites of intraabdominal injury from a knowledge of the injuring agent.

Primary Effects of Injury

Irrespective of the mechanism of injury and whether the wound is penetrating or nonpenetrating, the primary effects of abdominal injury are hemorrhage and peritonitis (figure 7). It is immediately evident that these two states are interrelated, since intraabdominal hemorrhage produces peritoneal irritation as well as reduction in circulating blood volume, while peritonitis is associated with peritoneal irritation and, if severe, with reduction in circulating blood volume. Although this interrelationship may sometimes make it difficult to differentiate between hemorrhage and peritonitis as a cause of the clinical manifestations, in general the signs of reduction of blood volume which follow peritonitis will appear later than those which occur following hemorrhage.

Pathologic Anatomy

In a recent analysis of 400 cases of stab wounds of the abdomen reviewed by one of my associates, Dr. Kenneth Moss, it was found that a variety of intraabdominal structures were injured (table 1). In about one-fourth of the cases the liver was involved, with the stomach, small intestine and large intestine next in order of frequency. Although retroperitoneal hematoma occurred in 5.75 per cent, injury to retroperitoneal viscera (duodenum, pancreas and kidney) was less common. In contrast, a review of 30 cases of gastrointestinal perforation following nonpenetrating abdominal trauma disclosed injury to the stomach in one instance, duodenal injury in two, jejunal injury in 18, injury to the ileocecal region in eight, and injury to the sigmoid

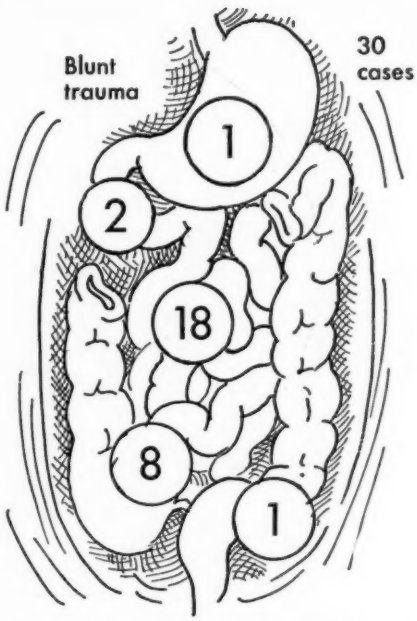

FIGURE 8. Incidence of involvement of various abdominal structures in 30 cases of gastrointestinal perforation following nonpenetrating abdominal trauma.

TABLE 1

INCIDENCE OF INJURY TO ABDOMINAL AND THORACIC STRUCTURES IN 400 CASES OF STAB WOUNDS OF THE ABDOMEN

Liver	103
Stomach	55
Small bowel	50
Large bowel	35
Omentum	27
Spleen	26
Hematoma (retroperitoneal)	23
Diaphragm	19
Mesentery	15
Pneumothorax	14
Gallbladder	11
Bleeding wound, hemothorax	10
Inferior vena cava	8
Duodenum, pancreas, mesocolon	7
Intercostal artery	5
Kidney	4
Aorta, uterus, bladder	1

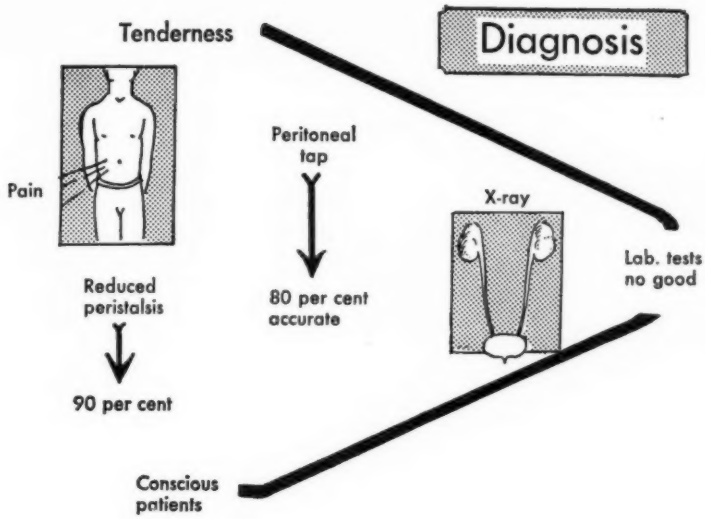

FIGURE 9. Tenderness, pain or reduced peristalsis, or a combination of these three findings, is present in about 90 per cent of conscious patients with intraabdominal injury. Paracentesis is about 80 per cent accurate in indicating hemorrhage or peritonitis. X-rays are not of much help except in detecting genitourinary injuries. Laboratory data are of even less value.

in one (figure 8). The frequency with which the spleen and liver are involved in nonpenetrating abdominal trauma is well known and does not require elaboration here.

Diagnosis

Having in mind the mechanisms of injury, the frequency of involvement of the various intraabdominal structures, and the primary effects of injury, let us consider the diagnosis. It must be emphasized that one needs to rely on clinical manifestations in order to make an early correct diagnosis. History is important, to be sure, and should be carefully elicited whenever possible. Unfortunately, many of these patients are comatose or are so confused that a reliable history cannot be obtained.

Signs of peritoneal irritation usually are present following injury to intraabdominal structures. Next in frequency is the evidence of intraabdominal hemorrhage. The manifestations of peritoneal irritation and intraabdominal hemorrhage often can be detected only by frequent careful examination. If the patient is examined shortly after injury, physical signs may be equivocal, but as bleeding and peritonitis continue the signs become more clear-cut and subsequent examination will reveal the presence of intraabdominal injury.

Tenderness over the abdomen is the most common finding. Then comes abdominal pain and, finally, auscultatory evidence of reduced peristalsis (figure 9). One or all of these manifestations are present in about 90 per cent of conscious patients. The next most helpful diagnostic maneuver is paracentesis of the abdomen, which in our experience is accurately indicative of hemmorrhage or peritonitis in about 80 per cent of

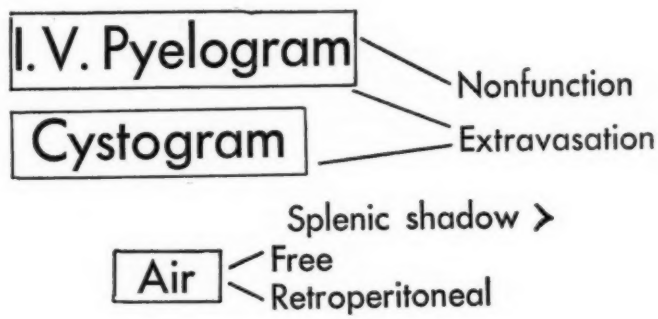

FIGURE 10. Roentgenography is invaluable in detecting injury to the genitourinary tract.

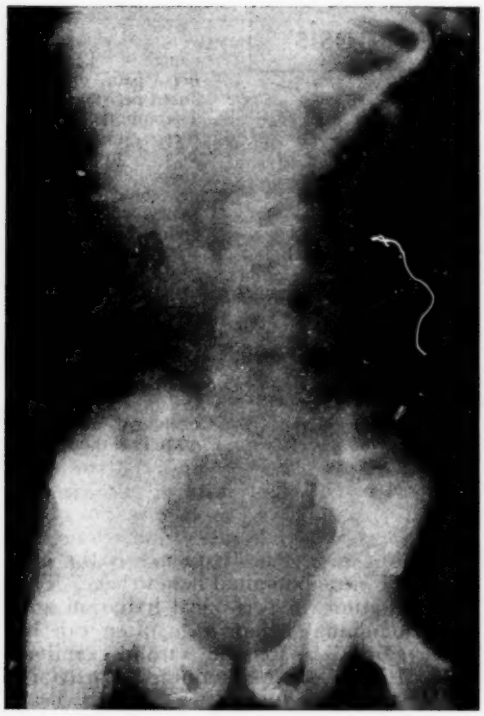

FIGURE 11. Extravasation of dye around right kidney in intravenous pyelogram of a child injured when he ran into a clothesline. There was no blood in the urine. Operation disclosed splenic rupture and complete disintegration of the right kidney.

FIGURE 12. Displacement of left ureter toward midline. Patient was kicked in the left flank. Perforation of the descending colon and a large surrounding hematoma were found at operation.

cases. This procedure will be described in detail later.

One should not expect to get much help from x-ray examination in establishing the diagnosis, except in instances of injury to the genitourinary tract. At best, roentgenograms of the abdomen are suggestive, but without the support of physical findings they usually are inadequate. As for laboratory examinations, these are of even less value, and aside from the detection of blood in the urine they are of little practical value.

Although roentgenograms do not often establish the correct diagnosis of other abdominal injuries, they are invaluable in detecting injury to the genitourinary tract (figure 10). Intravenous pyelograms will clearly reveal nonfunction of or extravasation from an injured kidney. The following cases illustrate the value of excretory urograms.

A child ran into a clothesline which struck him across the middle of the abdomen. When he was admitted to the hospital it was obvious that there was intraabdominal injury, and it was the consensus that the injury consisted of a ruptured spleen. However, to rule out injury to the urinary tract an intravenous pyelogram was obtained which disclosed extravasation of dye around the right kidney, although there was no blood in the urine (figure 11). At operation it was found that the spleen was ruptured, but there was also complete disintegration of the right kidney.

A man was kicked in the left flank during a barroom brawl and came to the hospital several hours later with signs of peritonitis. An intravenous pyelogram disclosed displacement of the left ureter toward the midline (figure 12). At operation there was a perforation of the descending colon with a large surrounding hematoma.

In addition to detecting rupture of the bladder, a cystogram also may aid in diagnosis of retroperitoneal hematoma prior to operation. A child was crushed between two moving automobiles, and when admitted to

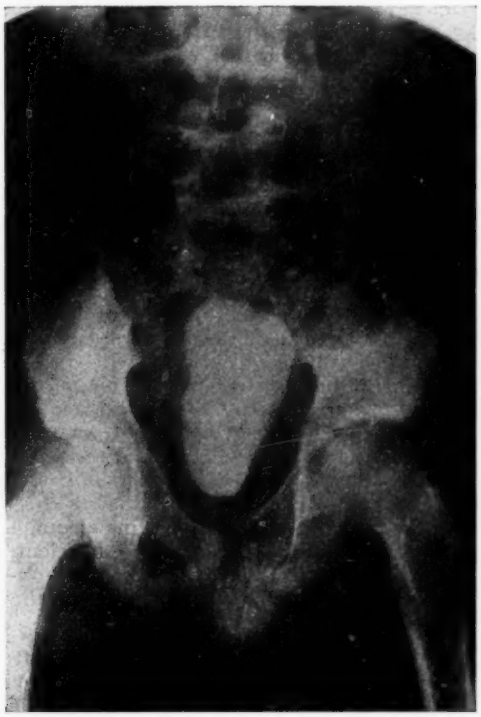

FIGURE 13. A cystogram may aid in preoperative diagnosis of retroperitoneal hematoma, as this film did. The patient, a child, was crushed between two moving automobiles and was in severe shock without evidence of peritonitis. Pear-shaped deformity of bladder indicates hematoma.

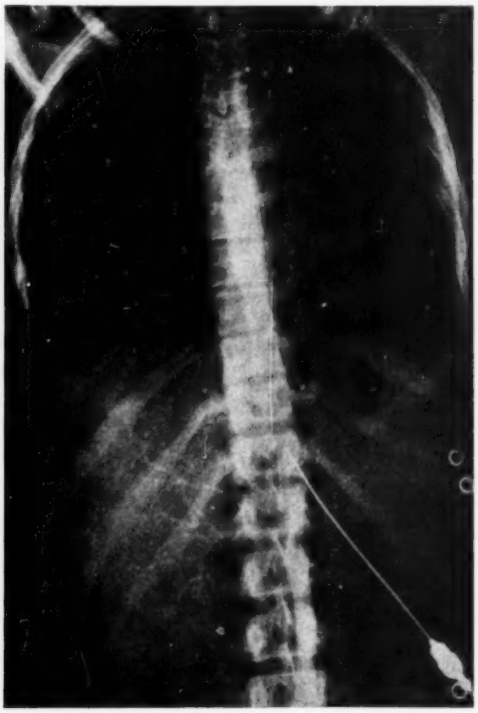

FIGURE 14. Vascular injuries are often associated with abdominal trauma, and arteriographic studies are being made with greater frequency to detect them. In this patient, who was injured in an automobile accident, the left renal artery was not visualized on a lumbar aortogram. It had been sheared off from the aorta.

the hospital was in severe shock without evidence of peritonitis. A cystogram showed a pear-shaped bladder deformity indicative of an extensive retroperitoneal hematoma (figure 13).

As experience with acute traumatic conditions accumulates, it becomes evident that vascular injury is often associated with abdominal trauma. Thus, we are employing arteriography with greater frequency in an attempt to detect arterial injury prior to operation. Recently a patient was admitted to the hospital following an automobile accident. There were obvious signs of peritoneal irritation, and blood was present in the urine. An intravenous pyelogram revealed nonfunction of the left kidney, and on a lumbar aortogram the left renal artery could not be visualized (figure 14). At operation it was found that the left renal artery had been sheared off from the aorta.

Perforation of a hollow viscus as a result of abdominal trauma may produce air under the diaphram which is detectable on the roentgenogram (figure 15). Injury of the spleen with hematoma formation may be evident from the x-ray examination. In one instance the roentgenologist was performing a barium enema study following a gastrointestinal series and observed that the stomach was displaced medially and the splenic flexure of the colon was displaced downward by a shadow in the left upper quadrant (figure 16). Careful questioning of the patient disclosed that he had sustained an insignificant blow to the left chest cage eight days previously. At operation a subcapsular hematoma of the spleen was found.

The diagnostic value of abdominal paracentesis was mentioned earlier. Because of its importance I would like to describe the

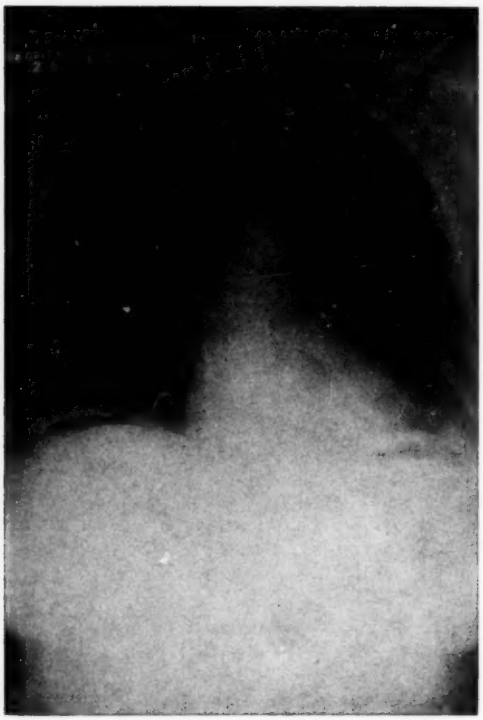

FIGURE 15. Air under the diaphragm in a case of perforation of a hollow viscus due to abdominal trauma.

technic (figure 17). For this procedure we use a Potter needle which is fluted on the end and has an opening on the side. In years past it was used in inducing artificial pneumothorax for the treatment of tuberculosis. The lower quadrants of the abdomen are prepared with antiseptic solution, and the skin and subcutaneous tissues are infiltrated with 1 per cent NOVOCAINE®. A 10 cc. syringe is attached to the Potter needle and it is inserted into the abdominal cavity through the anesthetized area. Aspiration is carried out, and if negative a second aspiration is made in a similar site in the opposite lower abdominal quadrant. Since this test is negative in about 20 per cent of cases in which there is significant abdominal injury, it should not be employed until thorough evaluation of the patient has been made. It is not a substitute for clinical judgment.

Treatment

The immediate treatment of a patient with abdominal injury should begin before examination and then proceed simultaneously with examination. While many of these patients will have multiple injuries and will require the attention of a variety of specialists, the physician to whom the patient presents himself first is the one who should decide the direction the case will take. I do not mean to imply that the physician making the initial examination will necessarily do all that needs to be done, but there are certain things he must do if the patient is to survive in a condition which will permit definitive therapy. For instance, one must insure that the patient has an adequate airway and an adequate circulating blood volume. A patient with an abdominal injury may also have an obstructed airway from tracheal or intrathoracic injury or from aspirated vomitus or from other causes. He may be comatose and the pharynx may be blocked by the tongue. Therefore, one must make certain that air is moving in and out of the lungs in adequate quantities, and that the lungs are sufficiently expanded to provide the necessary contact between alveolar air and blood in the pulmonary capillaries.

Any patient who has severe abdominal injury will have some reduction of the circulating blood volume, and this usually is evident by an increase in the pulse rate and a reduction in blood pressure. It is a policy in our emergency room to start a solution of crystalloid (physiologic saline or dextrose) solution at the time the patient is typed and cross matched for blood. We then complete the initial physical examination, and by this time blood will be available for administration if necessary. When the patient is admitted in extreme shock, a plasma expander is administered instead of a crystalloid solution.

After initial resuscitative measures have been taken, one can begin to assess the extent of total injury. One can determine the presence of major fractures, significant thoracic injury, damage to the urinary tract, and the presence of blood in the abdomen. Fractures should be properly splinted before the patient is moved for x-rays or to the operating room. The blood volume should be replaced also before the patient is moved, unless it is evident that continued massive hemorrhage is taking place. If there is associated thoracic injury with the presence of hemopneumothorax, this should be managed by insertion of an intercostal catheter connected to underwater drainage.

FIGURE 16. Splenic injury with hematoma may be evident from x-ray examination. This patient had a subcapsular hematoma of the spleen as a result of a seemingly insignificant blow to the chest eight days earlier.

Illustrative Cases

To illustrate the important features in the management of abdominal injury, I would like to present briefly the chronology of treatment in several patients.

Case 1 (table 2)—A 14 year old boy was run down by an automobile and was brought to the emergency room within one hour. He was moderately hypotensive, and dextrose solution was started as an infusion. When blood became available, 500 ml. was administered promptly. Examination of the abdomen disclosed abrasions over the left upper quadrant and over the left lower costal margin. There was also abdominal tenderness. Fifteen minutes after admission, abdominal paracentesis was performed and yielded nonclotting blood. At operation a ruptured spleen was removed. During the operation the patient required 1500 ml. of blood to stabilize his blood pressure. This case illustrates that the severity of the deficit in blood volume due to hemorrhage may not be apparent prior to operation. However, as soon as the abdomen is opened, the blood pressure falls and additional blood is required to stabilize the blood pressure and pulse. In this in-

TABLE 2

CASE 1: CHRONOLOGY OF EVENTS

10:30 A.M.	Patient run down by automobile
11:30 A.M.	Arrival in emergency room. Blood pressure 90/60, pulse 100 Infusion of 300 ml. 5 per cent dextrose in physiologic saline solution Administration of 500 ml. blood; blood pressure 110/70
11:40 A.M.	Examination. Abrasions, left upper abdominal quadrant, lower left chest; abdominal tenderness
11:45 A.M.	Abdominal paracentesis, nonclotting blood
12:00 noon	Operation. Lacerated spleen removed. Tear in left lobe of liver repaired. Blood administered, 1500 ml.
1:00 P.M.	Operation concluded *(Total blood administered, 2000 ml.)*

TABLE 3

CASE 2: CHRONOLOGY OF EVENTS

October 11, 6:10 P.M.	Patient struck left side of chest against chair
October 16, 5:45 A.M.	Arrival in emergency room. Blood pressure 105/70, pulse 88. Sharp pain, left lower chest, left upper abdominal quadrant, left shoulder. Abdominal examination negative
6:00 A.M.	Hematocrit 23 vol. per cent
4:00 P.M.	No change in physical signs
October 17, 7:00 A.M.	Abdominal paracentesis, nonclotting blood. Administration of 1500 ml. whole blood
8:00 A.M.	Operation. Subcapsular hematoma of spleen with rupture. Splenectomy. Administration of 1000 ml. of blood
9:00 A.M.	Operation concluded *(Total blood administered, 2500 ml.)*

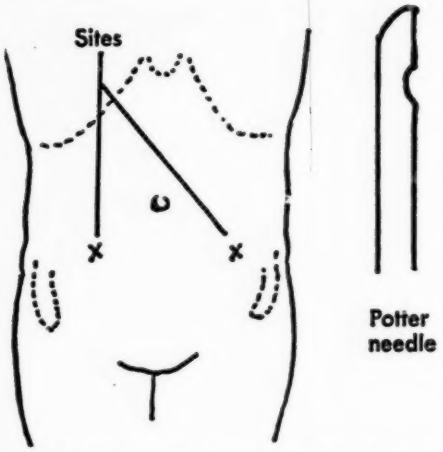

FIGURE 17. Diagram showing sites of abdominal paracentesis and Potter needle used.

stance the blood pressure was 110/70 mm. Hg when the patient was moved to the operating room, but as soon as the abdomen was opened it fell and 1500 cc. of blood was required to restore the pressure to normal.

Case 2 (table 3)—A 23 year old woman struck the left lower portion of her chest against a chair on October 11. Although the site of injury was painful for a few moments, she subsequently forgot about it until October 15, when she began to have pain in the left lower part of her chest, left upper abdominal quadrant and left shoulder. She came to the emergency room the following morning. Examination failed to reveal significant abnormalities, although the hematocrit was 23 vol. per cent. This, combined with the symptoms, suggested splenic injury, so she was examined repeatedly by the residents. On October 17, abdominal paracentesis yielded nonclotting

TABLE 4

CASE 3: CHRONOLOGY OF EVENTS

11:05 P.M.	Stab wound in abdomen
11:35 P.M.	Arrival in emergency room. Blood pressure 110/70, pulse 120. Infusion of 5 per cent dextrose in physiologic saline solution. Omentum protruding from ¾ in. wound in epigastrium. General abdominal tenderness
2:35 A.M.	Operation; 200 ml. blood in peritoneal cavity. Lacerations of anterior wall of stomach and right lobe of liver repaired
3:40 A.M.	Operation concluded *(No blood administered)*

TABLE 5

CASE 4: CHRONOLOGY OF EVENTS

12:30 A.M.	Arrival in emergency room. Patient found by police after automobile accident. Steering-wheel injury. No blood pressure. Dextran infusion, 1000 ml. Ventilation adequate
12:45 A.M.	Administration of 1000 ml. blood. Blood pressure 100/60
12:50 A.M.	Diminished breath sounds, right lung; general abdominal tenderness; diminished peristalsis
1:00 A.M.	Abdominal paracentesis, blood
1:05 A.M.	Right thoracentesis, hemothorax. Intercostal tube, water-sealed drainage
1:15 A.M.	Patient moved to operating room. Blood pressure became imperceptible when anesthesia started. Cardiac arrest. Thoracotomy and cardiac massage. Resuscitation
1:45 A.M.	Abdominal exploration. Ruptured spleen removed; avulsion of mesenteric root repaired; laceration of superior mesenteric vein repaired; lacerated duodenum repaired
3:00 A.M.	Operation concluded *(Total blood administered, 6000 ml)*

blood. Operation was performed and a subcapsular hematoma of the spleen was found. Splenectomy was followed by uneventful recovery. In this case 2500 ml. of whole blood was required to restore the blood volume to normal.

Case 3 (table 4)—A 24 year old man received a stab wound in the abdomen and was brought to the hospital immediately. Blood pressure was normal and there was slight tachycardia. Omentum was protruding through a wound in the epigastrium. Operation was performed promptly, and a perforation of the anterior wall of the stomach and a laceration of the right lobe of the liver were repaired. The patient did not receive any blood and was discharged from the hospital within six days.

Case 4 (table 5)—A 52 year old man was found by the police some time after an automobile accident. He was brought to the emergency room. Blood pressure could not be detected. Dextran was administered immediately, and as soon as blood was available 1000 ml. was given rapidly, with the result that the blood pressure rose to 100/60 mm. Hg. Twenty minutes after admission, examination was begun. Breath sounds over the right side of the chest were diminished and there was generalized abdominal tenderness and reduced peristalsis. Abdominal paracentesis yielded blood, and thoracentesis on the right side revealed hemothorax. A catheter was inserted into the right side of the chest through an intercostal space

TABLE 6

CASE 5: CHRONOLOGY OF EVENTS

2:00 A.M.	Arrival in emergency room, comatose, after injury in automobile collision; patient ejected from car. Blood pressure 84/40, pulse 100
2:05 A.M.	Dextran infusion. Ventilation adequate
2:20 A.M.	Blood pressure 90/50. Administration of 500 ml. blood, nasal oxygen
2:45 A.M.	Blood pressure 120/70, pulse 90. Gastric tube inserted. Urinalysis and abdominal paracentesis yielded blood
3:00 A.M.	X-rays. Fractures of left humerus, right radius, six ribs, right acetabulum
3:15 A.M.	Blood pressure 80/50, pulse 110. Administration of 500 ml. blood
3:30 A.M.	Blood pressure 100/60. Administration of 500 ml. blood
4:00 A.M.	Moved to operating room. Blood pressure (?), 1000 ml. blood
4:15 A.M.	Anesthesia. Blood pressure 90/60, 1500 ml. blood
4:20 A.M.	Operation. Repair of laceration of liver; ruptured spleen removed; compound fractures debrided; tracheostomy
6:15 A.M.	Operation concluded *(Total blood administered, 6000 ml.)*

and connected to water-sealed drainage. The patient was then moved to the operating room. When anesthesia was started the blood pressure became imperceptible and cardiac arrest ensued. The thorax was opened and cardiac massage was instituted, and after about 30 minutes a forceful beat was resumed. The abdomen was then opened, and the following injuries were found: rupture of the spleen, occlusion of the root of mesentery, laceration of the third portion of the duodenum, and laceration of the superior mesenteric vein. All these structures were repaired and the spleen was removed; however, it proved necessary to administer 6000 ml. of whole blood to maintain a satisfactory blood pressure. In retrospect, it is evident that blood volume replacement had not been adequate when the patient was moved to the operating room; this caused cardiac arrest.

Case 5 (table 6)—A 21 year old man was driving at high speed and ran into a bridge abutment. He was ejected from his automobile and was brought to the emergency room in a comatose state. Blood pressure was 84/40 mm. Hg, and pulse rate was 100 per minute. A dextran infusion was started while blood was being typed and cross matched. During examination of the abdomen, the blood pressure fell, and after administration of 500 ml. of blood it rose to 120/70 mm. Hg. At this time a gastric tube was inserted and urinalysis and abdominal tap were performed. There was gross blood in the urine and in the abdomen. One hour after admission, the patient was moved to the x-ray room, where fractures of the left humerus, the right radius, six ribs and the right acetabulum were demonstrated. When the patient was returned to the emergency room the blood pressure dropped to 80/50 mm. Hg, and 1000 ml. of blood was administered. In spite of continued transfusion, the pressure did not stabilize, so the patient was moved rapidly to the operating room and a celiotomy was performed. A laceration of the liver was repaired, a ruptured spleen was removed, the compound fractures were debrided, and a tracheostomy was done. During operation 600 ml. of blood was required for replacement. Upon completion of the operation the blood pressure was 130/90 mm. Hg. The patient recovered uneventfully. This case illustrates the fact that one cannot spend too much time preparing a patient for operation when the condition for which operation is being done is rapidly destroying him. This applies not only to abdominal trauma but to injuries and disease of any kind. Thus, we must achieve a proper balance between preparation for operation and the operation itself, and considerable clinical judgment is required.

In general, it is our policy to err on the side of operation in dealing with abdominal injuries. This is particularly true in the case of penetrating wounds, since we have

TABLE 7

CLASSIFICATION OF 400 CASES OF STAB WOUNDS OF ABDOMEN ACCORDING TO PENETRATION AND INJURY

GROUP	PENETRATION	INJURY
1	No	None
2	Yes	None
3	Yes	Trivial
4	Yes	Serious*

*Shock; laceration of hollow viscus, partial or complete; active hemorrhage; hemoperitoneum, 500 cc. or more.

TABLE 8

MORTALITY IN 400 CASES OF STAB WOUNDS OF THE ABDOMEN

GROUP	NUMBER OF CASES	DEATHS	
		Number	*Per cent*
1	73	0	
2	77	0	
3	66	0	
4	184	5*	2.7
Total	*400*	*5*	*1.3*

*Pneumonia, one; hemorrhage, four (vena caval injuries, three; aortic, one).

learned that the risk of exploration is small and the results are gratifying in terms of being able to repair damage which was not apparent clinically. In a series of stab wounds of the abdomen to which I referred earlier, it was found that a majority occurred in the anterior abdominal wall, particularly in the upper quadrants. These cases were divided into four groups according to the following criteria: (1) no intraabdominal penetration and no intraabdominal injury, (2) penetration into the abdominal cavity but no intraabdominal injury, (3) penetration into the abdominal cavity with trivial abdominal injury, and (4) penetration with serious abdominal injury (table 7). An analysis of the results in these four categories reveals that no deaths occurred in groups 1, 2 and 3 and the mortality in group 4 was only 2.7 per cent (table 8). Thus, the mortality rate for the total series (and operation was performed in each of these cases) was 1.3 per cent. I would like to add and not without considerable pride, that these patients with stab wounds of the abdomen, and, in fact, almost all the patients I have discussed herein, were treated by our residents. As these statistics demonstrate, it was good treatment.

Intervertebral Disk Disease Caused By The Brucella Organism*

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BRUCELLOSIS can produce changes in the spine simulating hypertrophic osteoarthritis and the syndrome of pain in the back and sciatica. The condition has been neglected in the differential diagnosis of disk disease and may have gone unrecognized in many obscure cases of pain in the back. The purpose of this paper is to show that spondylitis caused by *Brucella* infection in man has its origin in a destructive granulomatosis of the intervertebral disk. This theory opposes the belief that involvement of the disk spreads from the bony matrix. The fact that in most cases the pathology in the vertebral body is fully developed together with the disk lesions has precluded the recognition of this alternative explanation, the more so because early localization in the bone marrow is characteristic of the *Brucella* organism. A recently studied case demonstrates the presence of granulomatous destruction limited to the interbody joint. Radiographic and pathologic evidence from other cases also implicates the disk in the pathogenesis of brucellar spondylitis.

BRUCELLA ORGANISMS AND BRUCELLOSIS

Evans,[6] recognizing the similarities in the organisms discovered by Bruce (Malta, 1887) and by Bang (Denmark, 1897), suggested the generic name to honor Bruce, who led the investigation that determined the cause of undulant fever in man. Subsequently the organism recovered from aborting sows by Traum (United States, 1914) was added to the genus. *Br. melitensis, Br. abortus* and *Br. suis* share serologic and pathogenic properties, but each has distinct cultural characteristics. All are pathogenic for man as well as dogs, horses, wild animals and fowl. Brucellosis is the most common disease transmitted from animal to man.

The disease is widespread in the United States and Canada, but most cases occur in livestock regions. The acute illness, commonly a mild and vague febrile disturbance, usually is neglected. Only 1,300 of an estimated 30,000 to 40,000 cases[22] were reported to the U.S. Public Health Service (1956).[26] Serologic evidence of infection in animals, the reservoir for human infections, was found in 3 per cent of 5 million cows in 1951.[10]

The protean manifestations of the acute illness are ill-defined and include fever, malaise, weakness, pain in the joints, headache and loss of weight. Most infections occur in males; children are resistant to the organism. It is an occupational disease of farmers, meat handlers and slaughter-house workers. The diagnosis is confirmed if serum agglutinates *Brucella* antigen in a dilution of 1:80 or higher.

The most important route of infection is through the skin;[15] the respiratory route is involved in certain instances. Regional lymphadenopathy and a transient bacteremia ensue, the organism eventually assuming an intracellular position in the reticuloendothelial system from which an outpouring of bacteria may persist for years.[19] The histopathology of the infection has been thoroughly studied by standard infection of the guinea pig[7] and confirmed by bone-marrow studies in humans.[14] Characteristic granulomatous lesions in liver, spleen, testicle and bone marrow reach full development in 3 to 4 months.

BRUCELLA SPONDYLITIS

Involvement in the spine is characterized by a proliferative sclerotic reaction together with a destructive process involving the articulation of the intervertebral body, distinct in its slow progress, and culminating over months and years in ankylosis of the involved region. Lowbeer[17] has made the most extensive review of the subject of brucellar osteomyelitis and spondylitis in his analysis of the pathology in this complication. Mantle[18] found a paucity of reports

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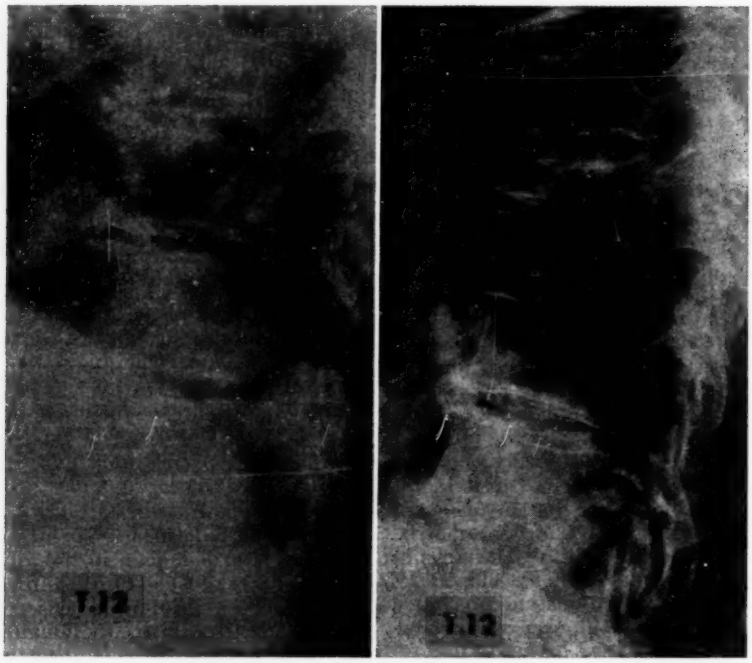

FIG. 1. Brucellar spondylitis complicated by collapse of vertebral body and abscess. A 71-year-old butcher with radiating gridle pain for 6 weeks. Fever was persistent. *Brucella* agglutination was 1:10,240. (*Left*) Changes in thoracolumbar vertebrae interpreted as hypertrophic spurs. Thinning of disk and osteophytes are typical of brucellar spondylitis. (*Right*) Two and one-half months later, opposing surfaces of T8-T9 were destroyed and there was early paravertebral abscess. Sclerosis of the osteophyte at T10-T11 is more apparent. Process controlled with spinal fusion.

in the North American literature dealing singly with brucellar spondylitis and implied that bony complications in England and America are rare. Spink[23] has included the problem of spondylitis in his numerous monographs on brucellosis in America and stated that it occurs in more than 10 per cent of cases.[24]

In the cases of brucellosis admitted to the Royal Victoria Hospital in Montreal the incidence of the complication of spondylitis was only slightly higher than in Spink's experience. Four of 26 patients with serologically proven infections were admitted because of spondylitis. Nine of the 26 had pain in the neck and back as a part of the other symptoms, but no special investigations attended these complaints.

Brucellar spondylitis is a well-recognized entity in areas where the more invasive *Brucella melitensis* is endemic. Zammit,[28] reviewing 62 cases from Malta, and Granjon and Mouren,[13] reporting on 24 cases from France, have recently given emphasis to the important clinical and radiographic features.

Clinical Picture. The constant feature is pain relieved by rest, localized to the affected region of the spine, occurring late in the convalescent period. Commonly occurring before radiographic signs have appeared, this stage is usually unidentified as being brucellosis, the nature of the initial infection having been neglected. Radiating pain of girdle and extremities is present in more that one-half of the cases.[28] Restriction of motion, muscle spasm, tenderness and signs of nerve-root involvement are common. In severe infections paravertebral abscess may also develop, usually in association with the acute disease (Fig. 1). Extradural compression also occurs.[9]

Radiological Appearance. The common feature in numerous illustrations from foreign case reports is participation of the articulation of the intervertebral body. The first conspicuous sign is a step-like erosion of the margin of the vertebral body opposing the disk (Fig. 2, middle). Invariably there is already thinning of the disk and faint osteophytic bridging. Abnormality in the disk is emphasized by Zammit[28] in his

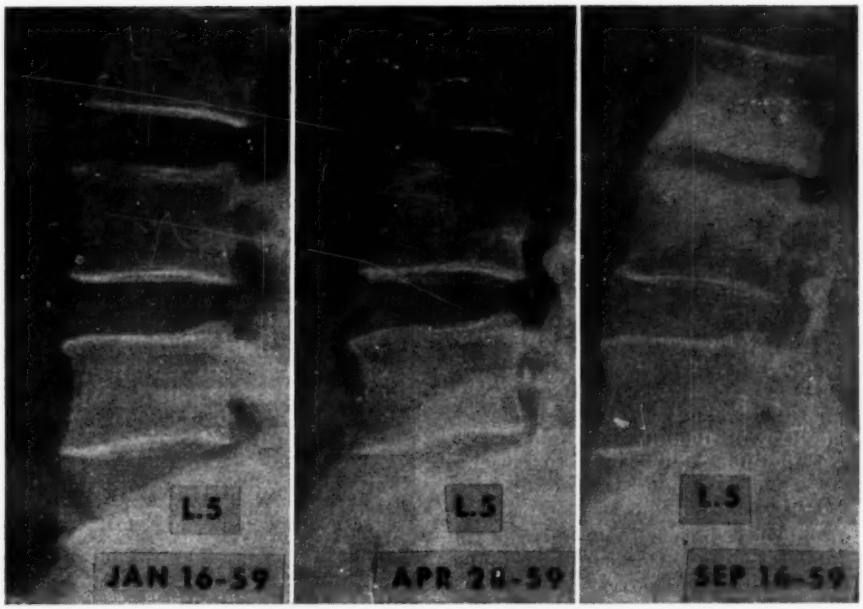

FIG. 2. Brucellar spondylitis. Progression of changes in the L2-L3 interbody joint. Radiographic characteristics are confirmed in this single case: isolated involvement at one level, thinning of disk, invasive destruction about the interbody joint and step-like erosion of bone (arrow) together with proliferative marginal osteophytic bridging. A 71-year-old male with sudden pain in the back. L4-L5 diskoidectomy (myelographic defect) and L5-S1 exploration performed because of fecal incontinence. Pain recurred and follow-up revealed the sequential changes. Controlled with plaster immobilization. *Brucella* agglutination was 1:80.

analysis of 62 cases of which only 3 failed to show a narrow disk space. The area of rarefaction in the corners of the opposing vertebral bodies mold themselves by a proliferative sclerotic process into characteristic spurs (Fig. 1 and 2). These assume the form of curved beaks bridging the borders of the interspace and are indistinguishable in chronic cases from the ordinary osteophytes of hypertrophic arthritis. Brucellar spondylitis, however, usually is limited to only one level. In the majority of cases the lumbar region is affected, the next most common site being the thoracic region. Frequent involvement occurs in the cervical vertebrae where the changes are of a similar nature.[1,18,25]

Pathology. The most important contribution to the understanding of the pathogenesis of brucellar spondylitis has been made recently by Villafane Lastra and Griggs.[27] They obtained specimens of spinal columns from fatal human cases in Argentina and correlated the gross pathological changes seen in full sagittal sections with the radiographic appearance. Although they concluded that the infection probably starts in the vertebral body, their specimens show distinct participation of the intervertebral disk in initiating osteomyelitis (Fig. 3). Their photomicrograph illustrates the implantation of infected necrotic disk tissue into the cancellous portion of the vertebral body.

To this pathological study can be added the present case, a patient with pain in the back and sciatica who was operated upon for protruded disk associated with spondylolisthesis. The surgical specimen shows destructive granulomatosis limited to the nucleus pulposus and collagen fibers of the annulus (Fig. 4). There is microscopic invasion of the cartilaginous plate by islands of granulomatous tissue. Elsewhere in the specimen there is an abundance of undisturbed cartilage. The vertebral body was uninvolved radiographically (Fig. 5) and remained so during a 9-month follow-up period. The circumstance was recognized as an opportunity to confirm infection localized in the intervertebral disk. One of Zammit's cases also showed radiographically the stage of involvement of the disk without subchondral bony erosion, but lacked

the histopathological material that can be included in the present study, a rather typical example of brucellar spondylitis.

CASE PRESENTATION

A 36-year-old dairy farmer was admitted Aug. 2, 1958, incapacitated for 3 weeks with low-back pain and right sciatica. Radiating pain in the leg had been sudden and had followed 6 months of low-back discomfort. At the age of 15 he had injured his back in a fall and had limped for 3 months.

In the summer of 1957, abortive disease first appeared in his herd of 50 to 75 cows. He alone handled the heavily contaminated fetal membranes. Government control of brucellosis in his herd had been under way. In the fall of the same year he was in bed for 3 days with a febrile illness and for the subsequent 2 weeks had mild fever and continued to feel weak.

He exhibited restricted movement of the back and a tender prominent L5 spinous process. On the right there was straight-leg-raising pain, weakness of gluteals and anterior tibial muscles, a hypoactive ankle-jerk reflex, and marked hypalgesia of lateral thigh, leg and foot. Roentgenograms showed a spondylolisthesis of L5-S1 and a myelographic defect on the right at the same level (Fig. 5). The cerebrospinal fluid protein was 150 mg. per cent.

He underwent operation on Aug. 9, 1958. A small, pale, soft mass was found epidurally in the floor of the canal. The disk was friable and necrotic. A bilateral diskoidectomy was done at the single L5-S1 level through a partial laminectomy. The L5 body was stable and the laminal arch was not excessively mobile.

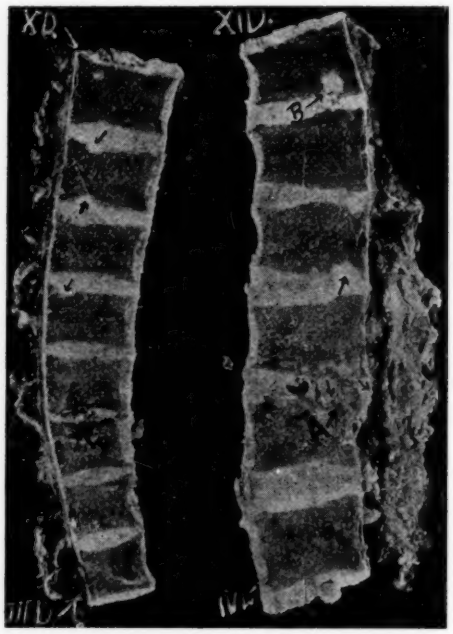

FIG. 3. Brucellar spondylitis. Photograph of autopsy specimen showing multiple areas of degeneration and herniation of disks caused by brucellosis. "B" is a Schmorl node resulting from implantation of infected tissue from disk in the marrow of the vertebral body. (Courtesy Villafane Lastra and Griggs and *Industrial Medicine and Surgery*[27])

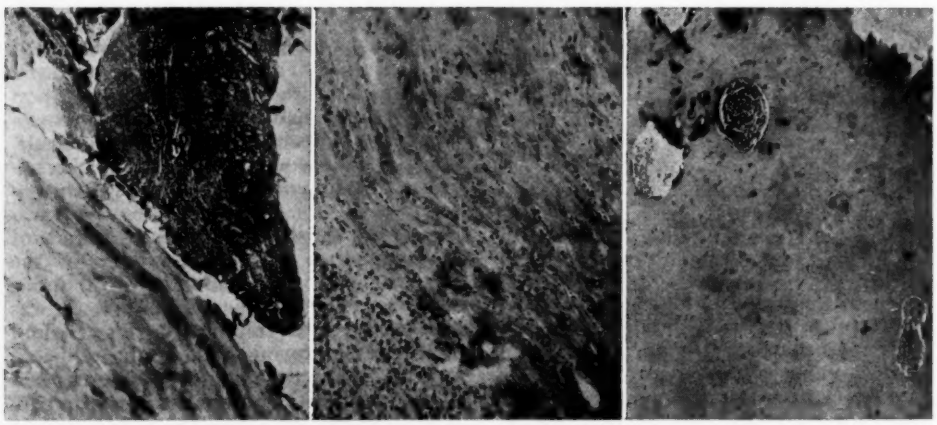

FIG. 4. *Present Case.* Brucellar spondylitis. (*Left*) Granulomatous destruction of the disk bordering on the uninvolved cartilaginous plate of the vertebral body. (*Center*) Early inflammatory involvement of collagen fibers of annulus fibrosus. (*Right*) Microscopic invasion of cartilaginous plate by islands of granulation tissue. The ragged upper aspect bordered on the destroyed substance of the disk.

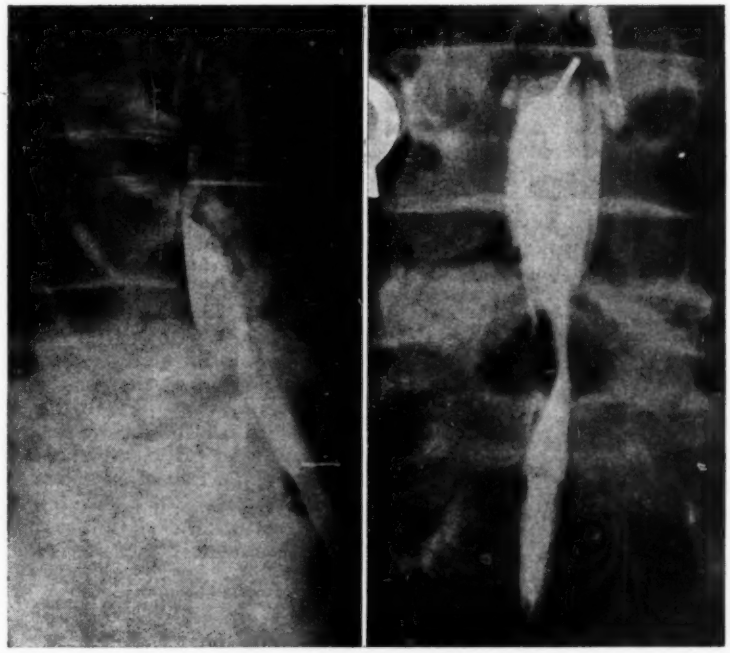

FIG. 5. *Present Case.* Brucellar spondylitis. Myelogram showing extradural defect caused by granuloma at the L4-L5 interspace where a spondylolisthesis also exists. Specimen from diskoidectomy showed granulomatous destruction of the intervertebral disk and microscopic invasion of the cartilaginous plate (see FIG. 4). The uninvolved vertebral bodies remained unchanged in the subsequent 9 months. Spontaneous arrest occurred with rest in bed and limitation of activity.

Microscopic study revealed granulomatous tissue (Fig. 4); subsequently serum-agglutination studies for *Brucella* were strongly positive at a dilution of 1:640.

In the initial postoperative period the patient's temperature was elevated every afternoon as high as 102°—103°F. He was given a 2-week course of Chloromycetin and streptomycin and was discharged after a month to continue rest in bed at home. Symptomatically he was relieved and radiographically there had been no progression.

Two months later he was allowed limited activity. Serum agglutinins were positive in a dilution of 1:320. By April, 1959 improvement had continued. Serum agglutination was still positive but now at a dilution of 1:80. Roentgenograms of the lumbar spine remained unchanged.

DISCUSSION

Infection in the intervertebral disk may be dependent upon organisms in the reticuloendothelial cells in the marrow of the adjacent vertebral body, invading by way of the perforated bony end-plate, for the adult disk has no blood or lymph vessels.[16] This implies exception to the time-honored concept that the disk, because of accessibility only by osmosis and intercellular lymph spaces, is rarely affected primarily by infection.[4] Perhaps one may assume that in the disk tissue a metabolic requirement is fulfilled for the organism to exhibit destructive multiplication. The absence of invasiveness in the marrow reservoir itself where the organism resides intracellularly for years is well recognized in brucellosis. The logic in Schmorl's idea that abnormality in the intervertebral disk is a prerequisite for development of osteophytes in hypertrophic osteoarthritis[21] lends support to the theory of primary involvement of the disk in brucellar spondylitis in view of the remarkable marginal spur formation which also occurs in this disease (Fig. 1 and Fig. 2). Isolated rarefaction of a vertebral body, as in one of Zammit's cases,[28] is an exception to the usual pattern of destructive and proliferative arthropathy of the interbody.

If the disk tissue is thought of as being embryonic in its derivation from the noto-

chord, one might reconcile the particular localization in the intervertebral disk with the infectious agent since the *Brucella* organsim seems to have a predilection for embryonic tissue. Bacteriologists are aware of the fastidious requirements of growth of the *Brucella* organisms and the suitability of the chick embryo as a culture medium. Other examples of localization in special tissue inherent to the organism are localization in the udder, invasion of the fetal membranes resulting in placentitis in the female bovine, and the orchitis that occurs commonly in the male animal.

It is not known what role hypersensitivity plays in the mechanism of pains in the joints in acute brucellosis.[3] Congestion and swelling in peripheral joints is common in brucellosis, and such a process in the disk might compress nerve roots and explain the radicular pain which is so common during the systemic complaints. Goldfain's[11] cases of a distinct monoarticular arthritis associated with brucellosis and the demonstration of a high percentage of positive *Brucella* agglutinin reactors among a series of patients with arthritis[12] are of interest in this respect.

Brucellar involvement of the spine is also common in swine. The specimens that Feldman and Olson[8] obtained from slaughter houses show that the involvement, as in man, is in the lumbar vertebrae and centers about the interbody space. Pressure of the spinal cord by the necrotic tissue causes "hind-quarter paralysis."

The present case may also be cited as an instance of infection in a "locus minoris resistentiae," a characteristic of brucellosis. The spondylolisthesis was undoubtedly a pre-existent deformity. This unique property is best exemplified in the case of an abscess which occurred around an old plated femur in a patient who had consumed unpasteurized milk for years.[5] Infections are known to have occurred years after the acute illness in a site of current injury.[2] The dissemination probably stems from the bone marrow where intracellular organisms exist chronically. It is also recognized that brucellar spondylitis is most frequent in the lumbar region, and it is here that degenerative disease of the disk predominates.

Early identification of the infection in brucellar spondylitis and immobilization by rest in bed prevent the complication of a protracted infection. The therapeutic implications are not as alarming as for tuberculosis which brucellosis, aptly named "pseudo-Pott's disease," simulates. In tuberculosis, on the contrary, the resistance to destruction of the disk and cartilage has been recognized.[4,20]

SUMMARY

The radiologic and pathologic appearance of advanced brucellar spondylitis suggests that destructive invasiveness begins in the intervertebral disk rather than as an extension from the bony matrix. A case is included in the present report which demonstrates primary involvement of the disk based on histopathological evidence of destruction of the nucleus pulposus, microscopic invasion of the cartilaginous plate and absence of changes in the bone. The special affinity for the intervertebral disk, a notochordal derivative, may be explained by the predilection of the *Brucella* organism for embryonic tissues. Brucellosis may be added to the few entities that cause particular involvement of the intervertebral disk.

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Book Review—Law And Medicine: Text And Source Materials On Medico-Legal Problems*

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THE law school administrator is well aware of the fact that only so many hours of formal instruction can be given the student during his or her three years in law school. Thus a delicate balancing of the pressing needs within this time pattern is required. Although told that "of the total litigation in this country, 80 per cent requires some medical testimony and 70 per cent turns not upon points of law but upon points of medicine",[1] few of these administrators have been able to find the finances, qualified personnel and time for a concentrated offering on medico-legal problems. The teacher of torts seldom does little more than point out that a pivotal issue in the controversy involves medico-legal aspects of liability, causation or damages. Similarly, in the evidence course, while the role of the expert is discussed, a lack of knowledge of the basic medical problems involved may well prevent a discussion of possible techniques for their effective presentation. If the lawyer and the judge remain unskilled in this area of knowledge, they may fall easy prey to some professional medical witnesses, experienced in courtroom procedure and the art of testifying but whose views are not necessarily medically correct, with consequent resulting medically unsound decisions. Professor Curran's *Law and Medicine,* a combination text and casebook, can be read with profit by the law school student, the lawyer and the judge. For the teacher in this area of the law the book is a "must".

While the book is long, it is not tedious reading. It is designed for the lawyer rather than the medical practitioner, although the medical specialist faced with appearing in court would gain much by carefully reading various selected sections. Its stated aim is "to provide a background of medical knowledge and applied legal skills which will enable the lawyer to deal effectively with medical issues." The attempt is not to make physicians of its lawyer-readers.

With this expressed aim, the author divides his book into six chapters. The initial chapter, entitled "Orientation to Medical Science and the Medical Profession", covers 116 pages. Since the medical and legal approach to the broad problem of disability are quite different, the author devotes much space detailing the scope of medical training, the major areas of medical science and medical practice, the functioning of hospitals and the process of diagnosis in the belief that "a realization of this divergence will perhaps be a starting point for achieving a greater degree of understanding between the professions." Chapter 2, entitled "The Process of Medical Diagnosis and Case Management", consumes 81 pages. Here the type of information and the procedures involved in the medical examination are detailed, the hospital patient record analyzed, and the causes and frequency of diagnostic errors as revealed by autopsy findings are discussed. Chapter 3, and a most fascinating chapter, is entitled "An Anatomy of Trauma" and is 123 pages in length. By means of reprinted text materials, notes and illustrative court decisions the author sketches the basic structure of traumatic medicine. Chapter 4, "Medical Proof in Litigation", requires 214 pages to cover a myriad of topics including, among others, X-rays, intoxication tests, blood grouping tests, neurological and psychological tests, physical displays and exhibitions in the courtroom and the use of charts, blackboards and other demonstrative techniques. Medical testimony is splendidly treated through the use of carefully selected cases and the topics of damages and settlements are not overlooked. Chapter 5, "Psychiatry and Law", some 175 pages in length, deals

*By William J. Curran. Boston: Little, Brown and Company. Pp. xxvii, 821. $12.50.

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[1]Dr. Murdock Head, chairman of George Washington University's Institute of Forensic Medicine.

with some of the fundamentals of psychiatry, the relationship between psychiatry and the law and the distinction between organic and functional psychoses. Divorce and annulment, as well as the making of wills and contracts is considered from a psychiatriac point of view and, as expected, the criminal tests of insanity are dealt with. The final chapter, "Government Regulation in Medicine and Public Health", fills some 133 pages.

The discussion of cancer including the transcript of a personal injury action involving the etiology of cancer provides one of many highlights. The several discussions of "whiplash" injuries, however, caution one that a book of this kind must be cited with care and with particular reference to the time of its publication for the term "whiplash" is a vanishing term.[2]

Professor Curran deserves high praise for the research, selection, organization and presentation of a considerable body of information now made available to those who will read *Law and Medicine.*

[2]The Revolt Against "Whiplash", a monograph published by the Defense Research Institute, Inc. (1961).

Annual Index—Volume XXVIII

This index covers the four issues of the Insurance Counsel Journal published in 1961, in January, April, July and October. All references are to pages of Volume XXVIII. For material appearing in the Yearbooks, and in Volumes I to XXVI, inclusive, of the Insurance Counsel Journal, see the General Index published May 1, 1960. For material appearing in Volume XXVII of the Insurance Counsel Journal, see pages 649 to 660 of that volume.

CASES DIGESTED